Petition

81-1450

No. ___-____

Office - Supreme Court, U.S.
FILED
FEB 8 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MICHELIN TIRE CORPORATION, *Petitioner*,

v.

NATHAN L. COULTER, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, SOUTHERN DISTRICT

JOHN M. KENNEY
3000 Marcus Avenue
Lake Success, New York 11042
(516) 775-7800

FLAVIUS B. FREEMAN
One Corporate Square
P.O. Box 4203 G.S.
Springfield, Missouri 65808
(417) 882-9090
Counsel for Petitioner

February 2, 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether a party to a civil action is denied its due process right to a fair trial when the trial judge is observed eating lunch with counsel for an opposing party in the public lunchroom of the courthouse during the trial while the jury is free to observe the meeting.

2. Whether an appellant in a civil action is denied its right to due process when an appellate court refuses to consider the prejudicial conduct of the trial judge, the facts of which are undisputed and conceded in the respondent's papers, on the ground that those facts had not been stated in an affidavit by trial counsel pursuant to state procedural rules.

LISTING PURSUANT TO SUPREME COURT RULE 28.1

Michelin Tire Corporation is a New York corporation. Its parent companies are the Michelin Corporation, the Michelin Investment Holding Company, Compagnie Financiere Michelin and Compagnie Generale des Etablissements Michelin. It has no subsidiaries or affiliates.

INDEX

	Page
QUESTIONS PRESENTED	i
LISTING PURSUANT TO RULE 28.1	i
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL, STATUTORY PROVISIONS AND CANONS OF JUDICIAL ETHICS INVOLVED	2
RAISING THE FEDERAL QUESTIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	11
APPENDIX	1a

TABLE OF CASES

CASES:	Page
Agee v. *Lofton*, 287 F.2d 709 (8th Cir. 1961)	9
Commonwealth Coatings Corp. v. *Continental Casualty Co.*, 393 U.S. 145 (1968)	7
Goldberg v. *Kelly*, 397 U.S. 254 (1970)	6
Hanch v. *K.F.C. National Management Corp.*, 615 S.W.2d 28 (Mo. 1981)	9
In re Murchison, 349 U.S. 133 (1955)	8
Marshall v. *Jerrico, Inc.*, 446 U.S. 238 (1980)	6, 7
Miley v. *Delta Marine Drilling Co.*, 473 F.2d 856 (5th Cir. 1973), *cert. denied*, 414 U.S. 871 (1973)	9
Newman v. *A.E. Staley Mfg. Co.*, 648 F.2d 330 (5th Cir. 1981)	9
Noll v. *Harrison County Bank*, 11 S.W.2d 1076 (Mo. App. 1928)	10
Pratt v. *Conway*, 148 Mo. 291, 49 S.W. 1028 (1899)	10
Public Utilities Commission v. *Pollak*, 343 U.S. 451 (1952)	6
Starr v. *United States*, 153 U.S. 614 (1894)	8
State v. *Charles*, 538 S.W.2d 944 (Mo.App. 1976)	10
Walsh v. *City of St. Louis*, 142 S.W.2d 465 (Mo. 1940)	10
Withrow v. *Larkin*, 421 U.S. 35 (1975)	8
Woosley v. *State Automobile Mut. Ins. Co.*, 600 S.W.2d 210 (Mo.App. 1980)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. ___-___

MICHELIN TIRE CORPORATION, *Petitioner*,

v.

NATHAN L. COULTER, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, SOUTHERN DISTRICT

The petitioner Michelin Tire Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Missouri Court of Appeals, Southern District, entered in this proceeding on August 13, 1981, subsequently withdrawn, and republished on October 6, 1981, after a motion for rehearing.

OPINION BELOW

The opinion of the Missouri Court of Appeals is reported at 622 S.W. 2d 421 (Mo. App. 1981), and appears in the Appendix hereto.

JURISDICTION

The judgment of the Missouri Court of Appeals was entered on August 13, 1981. Upon a motion for rehearing, it was withdrawn on September 22, 1981, and was republished on October 6, 1981. A timely motion for transfer to the Supreme

Court of Missouri was denied on November 10, 1981, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL, STATUTORY PROVISIONS AND CANONS OF JUDICIAL ETHICS INVOLVED

Fourteenth Amendment, United States Constitution:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

Missouri Rules of Civil Procedure, Rule 78.05:

> *Rule 78.05. After-Trial Motions, Including a Motion for a New Trial Based Upon Affidavits.*
>
> When any after-trial motion, including a motion for new trial, is based on facts not appearing of record, affidavits may be filed which affidavits shall be served with the motion. (. . .) Depositions and oral testimony may be presented in connection with after-trial motions.

Canon 2, Missouri Canons of Judicial Ethics:

> *A Judge Should Avoid Impropriety and the Appearance of Impropriety in His Official Activities.*
>
> * * * *
>
> B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. (. . .)

RAISING THE FEDERAL QUESTIONS

The Petitioner raised the first federal question, concerning its due process right to a fair trial, in its after-trial motion before the trial judge. *See* Petitioner's Memorandum in Support, and Petitioner's Motion, (A 32, 36-37).* The trial court entered an

*Reference is to the pages of the Appendix annexed hereto.

order denying the Petitioner's after-trial motions in all respects without discussion of the merits of the points urged in the motion. See Order of Circuit Judge John C. Crow, (A 28-29).

The Fourteenth Amendment fair trial claim was reiterated by the Petitioner before the Missouri Court of Appeals. See the Petitioner's Statement, Brief and Argument, (A 42, 45). The Missouri Court of Appeals noted the Petitioner's argument "that the trial judge's conduct was improper and a denial of due process to the defendant." Opinion of Judge Hogan, (A 22).

In denying the Petitioner relief on appeal on this constitutional issue, Court of Appeals stated that "[t]here is nothing before us for review on this point." (A. 23) The Court of Appeals thus refused to consider undisputed facts, which were conceded in Respondent's brief to that Court, for the reason that they were not contained in an affidavit. (A. 22) The Petitioner contends that this ruling was a second denial of due process. Since the Petitioner's Motion to Transfer to the Supreme Court of Missouri was denied, see Order of the Supreme Court of Missouri, (A 30), this second constitutional issue could be first raised only upon this petition for certiorari.

STATEMENT OF THE CASE

The personal injury upon which this strict tort liability litigation is based occurred on July 22, 1970, when Respondent Nathan L. Coulter was injured by the failure of a passenger car tire, distributed by Petitioner Michelin Tire Corporation, while he was attempting to mount it on a rim. The trial of the action before a jury commenced on November 27, 1978, in the Circuit Court of Greene County, Missouri. On November 29, 1978, during the trial, the trial judge was observed by the Petitioner's trial counsel eating lunch with one of Respondent's counsel at an open, public snack bar in the Greene County Courthouse, at a time when the jury had been released for a lunch period and were free to observe this conduct.

The jury ultimately rendered a verdict in favor of the Respondent in the sum of $140,000 as compensation for personal injuries.

The Petitioner made a timely after-trial motion for judgment in its favor in accordance with its motion for a directed verdict or for a new trial. Petitioner set forth the facts of the trial judge's luncheon with Respondent's counsel in its motion and its suggestions in support of its motion, albeit not in the form of an affidavit. The Respondent conceded these basic facts in its suggestions in opposition to the Petitioner's motion:

> In point seven of defendant's motion defendant states that "the Honorable John C. Crow, Circuit Judge for the Circuit Court of Greene County, Missouri, did between the hours of 12:00 and 12:30 p.m. and 1:15 p.m. on the 29th day of November, 1978, which was the third day of trial, eat lunch with one of plaintiff's counsel, Mr. Raymond Whiteaker, at a corner table at an open public snack bar in the Greene County Courthouse." It should be specifically noted that the aforementioned encounter between the Honorable Judge Crow and Attorney Whiteaker was very *brief*, that there were *no jurors present*, that the *case was in no manner discussed* and that *defendant voiced no objection* to the conduct which it now complains of, *made no record* regarding this alleged inappropriate conduct, and furthermore *did not request a mistrial*.
>
> The court can take judicial notice of the fact that the public snack bar referred to by defendant is of course quite small and as a result necessitates persons being in close proximity to one another. Under these circumstances it is hard to imagine how such conduct could be construed as conveying the impression that plaintiff's counsel was in a special position to influence the judge. (Emphasis in Original) (A 39-40).

The Respondent did not expressly deny that any other lunch meetings between his trial counsel and the trial judge occurred. The trial judge, of course, had personal knowledge of these

facts. The Petitioner's after-trial motion was denied by the trial judge, after oral argument, on March 13, 1979.

The Petitioner timely appealed to the Missouri Court of Appeals, Southern District from the order denying its after-trial motion. Once again, the Respondent's brief conceded that the trial judge had lunched with Respondent's counsel. Point V of the Respondent's Statement, Brief and Argument filed in the Missouri Court of Appeals states:

> The Conduct Of The Honorable John C. Crow In Eating Lunch And Having Brief Social Conversation With Counsel For Plaintiff In The Snack Bar Of The Courthouse During The Third Day Of The Trial Was Not Improper, And Defendant Has Waived Any Claim That It's Constitutional Rights Were Violated By Such Conduct In That Defendant Failed To Raise Such Claim At Its Earliest Possible Opportunity In The Trial Court And Defendant Has Failed To Assert That Any Prejudice Resulted To It As A Result Of Such Conduct. (A 47)

Eleven months after argument, the Court of Appeals affirmed the judgment of the trial court in an opinion entered on August 13, 1981. The Court of Appeals disposed of the issue of the trial judge's eating lunch with counsel for the Respondent on the last page of its opinion, holding that the issue was not properly before it, because the facts of the lunch meeting were not in the transcript or in affidavit form. On the principle that "[f]actual assertions in the brief cannot supplement the transcript," the Court of Appeals stated, "There is nothing before us for review on this point." (A 22-23).

The opinion of the Court of Appeals was withdrawn on September 22, 1981, after Petitioner filed a motion for rehearing and for transfer to the Missouri Supreme Court, and the same opinion was republished on October 6, 1981, thirteen months after argument. No additional briefs or further argument were requested by the Court of Appeals. (A 24) The

Petitioners' timely motion for transfer of the appeal to the Supreme Court of Missouri was denied by the Supreme Court of Missouri on November 10, 1981.

REASONS FOR GRANTING THE WRIT

The Decision Of The Missouri Court Of Appeals Was Not In Accord With Applicable Decisions Of This Court.

That due process requires an impartial decision maker is a basic proposition. *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970). In *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980), this Court wrote:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. . . . The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to popular government, that justice has been done, *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 172, (1951) (Frankfurter, J., concurring). . . .
>
> The requirement of neutrality has been jealously guarded by this Court.

Since there was no hearing below on the details of the discussion between the trial judge and Respondent's counsel over lunch, there is no proof of actual bias on the part of the trial judge, except for the luncheon itself and one other indication. That indication was the trial judge's statement in his order denying Petitioner's after-trial motion that Petitioner had not requested a remittitur, when in fact Petitioner had requested that precise form of relief, (A 28, 33).

Instead, the violation of due process at issue is the trial judge's appearance of partiality. As Justice Frankfurter wrote in recusing himself in *Public Utilities Commission* v. *Pollak*, 343 U.S. 451, 467 (1952), "[T]he administration of justice should

reasonably appear to be disinterested as well as be so in fact." And in *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145, 150 (1968), the Court stated that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."

The appearance of partiality impugns the integrity of the judicial process by destroying "the feeling . . . that justice has been done," as noted in *Marshall, supra*. Lunching with counsel for one party during a trial is clearly a breach of judicial ethics, as well. Canon 2 of the Missouri Code of Judicial Conduct explicitly states that a judge should not "convey or permit others to convey the impression that they are in a special position to influence him." The commentary to this Canon states:

> "*A judge must avoid all impropriety and appearance of impropriety in his official activities. He must expect to be the subject of constant public scrutiny*. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." (Emphasis supplied)

A trial judge is particularly open to scrutiny in the public snack bar of his courthouse. A judge's dining with attorneys for one of the litigants before him gives the clear impression that they are in a special position to influence him. If the Petitioner has no remedy for the harm caused by the foregoing prejudicial conduct, the canons of judicial ethics are rendered meaningless. [1]

---

[1] In any event, the trial judge's luncheon conference with plaintiff's counsel during a pending proceeding is also in conflict with Canon 3(4) of the Code of Judicial Conduct which provides in pertinent part: "A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. . . ."

The appearance of bias, when displayed before members of the jury, directly impinges upon the fairness of the trial. "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' " *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975), quoting from *In re Murchison*, 349 U.S. 133, 136 (1955). An analogous way that a judge may convey his sympathies or his evaluation of the disputed issues is by commenting on the evidence in the courtroom. As this Court wrote in *Starr* v. *United States*, 153 U.S. 614, 626 (1894), "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." Petitioner submits that a judge who dines with counsel for a party in the view of the public, including the members of the jury, sends a very strong signal to the jury that his sympathies lie with that party.

The Missouri Court of Appeals compounded the violations of the Petitioner's due process right to a fair trial by refusing to consider the propriety and effect of the judge's luncheon with counsel for the Respondent. The Court of Appeals refused to review the trial court's ruling on this point because, it stated, the facts upon which the trial court's decision were based were not in the record. To the contrary, the Petitioner did properly raise the issue of the trial judge's conduct, the facts were before the trial court on the Petitioner's after-trial motion, the trial court ruled on the issue, the facts were conceded by the Respondent before the Court of Appeals, and the Court of Appeals denied the Petitioner due process by not reviewing the trial court's ruling.

The Petitioner was not obliged, during the trial, to request that the judge not eat lunch with counsel for the Respondent. By objecting to the trial judge's conduct at trial, the Petitioner would have only antagonized the judge and aggravated whatever bias he appeared to have in the Respondent's favor.

The trial judge's conduct should have been reviewed by the Missouri appellate courts in any event, under the plain error rule. It is well established that

> counsel, in a trial such as this, are, understandably, loath to challenge the propriety of a trial judge's utterances, for fear of antagonizing him and thereby prejudicing a client's case. This Court, regardless of the absence of objections or exceptions, may notice plain error, and is under obligation to see that trials in the district courts are conducted impartially and that they are not without some measure of dignity and decorum.

Agee v. *Lofton*, 287 F.2d 709, 710 (8th Cir. 1961); *accord*, *Newman* v. *A.E. Staley Mfg. Co.*, 648 F.2d 330, 335 (5th Cir. 1981); *Miley* v. *Delta Marine Drilling Co.*, 473 F.2d 856, 857-8 (5th Cir. 1973), *cert. denied*, 414 U.S. 871 (1973). Missouri also follows the plain error rule. *Hanch* v. *K.F.C. National Management Corp.*, 615 S.W.2d 28, 33 (Mo. 1981); *Woosley* v. *State Automobile Mut. Ins. Co.*, 600 S.W.2d 210 (Mo. App. 1980).

Again, that the trial judge was antagonized by the Petitioner's objection to his conduct is evidenced by the statement in his after-trial order that the Petitioner had not requested a remittitur, when the Respondent had in fact moved for remittitur, (A 28, 33).

The Court of Appeals noted that the Petitioner raised the point of the judge's conduct in making its after-trial motion, but the motion was "not supported by affidavit or otherwise as provided by Rule 78.05." (A. 22) Missouri Rule 78.05 provides in pertinent part, "When any after-trial motion, including a motion for new trial, is based on facts not appearing of record, affidavits may be filed which affidavits shall be served with the motion." The Petitioner submits that it is a clear violation of due process to require an affidavit as a condition precedent to raising the issue relating to judicial misconduct when the facts were well known to the trial judge, were set forth in the

Petitioner's after-trial motion papers, and were conceded by the Respondent in its papers in opposition to the Petitioner's motion and in the Respondent's brief to the Court of Appeals, (A 32, 39-40, 47).

It is well established in Missouri law that an admission by counsel establishes the admitted facts as true in the record. For example, the Supreme Court of Missouri, in *Walsh* v. *City of St. Louis,* 142 S.W.2d 465, 467 (Mo. 1940), held that consideration of an issue of notice to the city of the plaintiff's claim was foreclosed by an admission of proper notice by counsel for the city at trial. The court found the fact established by reading the record and by "observ[ing] the conduct of counsel and of the trial judge. . . ." And in *Noll* v. *Harrison County Bank,* 11 S.W.2d 1076, 1077 (Mo.App. 1928), the Court of Appeals found facts to be admitted when, "[w]hile there was no specific testimony on the question, the record shows that this was not a contested point. It fairly discloses that it was admitted. . . ."

The fact of the luncheon is all the more firmly established in the record of the instant litigation, where the facts were uncontested, were known first-hand to the judge and counsel for both parties and were admitted in Respondent's motion papers. *See also Pratt* v. *Conway,* 148 Mo. 291, 49 S.W. 1028, 1030 (1899), "Courts are warranted in acting upon the admissions of counsel in the trial of a cause," recently quoted with approval in *State* v. *Charles,* 538 S.W.2d 944, 945-46 (Mo.App. 1976). Therefore, the refusal of the Court of Appeals to consider the issue of the trial judge's conduct merely because no affidavit was filed was contrary to Missouri law, common sense and the fundamental fairness required by due process.

CONCLUSION

Petitioner has been deprived of due process by the prejudicial conduct of the trial judge, and again by the actions of the Missouri appellate courts in refusing to deal with a violation of the Canons of Judicial Ethics. A writ of certiorari should issue to review the judgment and opinion of the Missouri Court of Appeals.

Respectfully submitted,

JOHN M. KENNEY
3000 Marcus Avenue
Lake Success, New York 11042

FLAVIUS B. FREEMAN
One Corporate Square
P.O. Box 4203 G.S.
Springfield, Missouri 65808

Counsel for Petitioner

February 2, 1982

Appendix

In The Missouri Court of Appeals

SOUTHERN DISTRICT
DIVISION TWO

No. 11336

NATHAN L. COULTER,
Plaintiff-Respondent,

v.

MICHELIN TIRE CORPORATION,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI

Honorable John C. Crow, Judge

FLAVIUS B. FREEMAN
NEALE, NEWMAN,
BRADSHAW & FREEMAN *of Springfield*
JOHN M. KENNEY, *of New Hyde Park, NY* *For Defendant-Appellant*

BENJAMIN J. FRANCKA *of Springfield*
RAYMOND E. WHITEAKER
JOHN E. PRICE
WOOLSEY, FISHER,
WHITEAKER, MCDONALD
& ANSLEY *of Springfield* *for Plaintiff-Respondent*

AFFIRMED

HOGAN, J.

In this action based on strict liability in tort, plaintiff Nathan Coulter has had a verdict and judgment in the amount of $140,000 against defendant Michelin Tire Corporation. Defendant appeals.

The casualty sued upon occurred July 22, 1970. Plaintiff was employed as a tire mounter by a corporation known as "Tire Town of Springfield." Shortly before noon, plaintiff and two other tire changers were mounting a new set of Michelin tires on a Lincoln Continental automobile. Plaintiff removed a tire and rim from the vehicle and placed it on a tire changer. He removed the tire which was on the rim and undertook to mount the new tire. While the plaintiff was attempting to seat the "bead" of the new tire against the rim, the tire exploded. Plaintiff sustained severe, disabling injuries. This action followed.

On this appeal, the defendant has briefed and argued five assignments of error. Defendant's principal point is that plaintiff made no submissible case. In connection with this point, a few preliminary observations are appropriate. The cause was tried and submitted upon the theory enunciated by our Supreme Court in *Keener* v. *Dayton Electric Manufacturing Company*, 445 S.W.2d 362, 364 (Mo. 1969). Therein, the court ". . . recognized the concept of strict liability in tort as stated in 2 Restatement, Law of Torts, Second, § 402A." *Blevins* v. *Cushman Motors*, 551 S.W.2d 602, 606[1] (Mo.banc 1977). In order to recover under the doctrine of strict liability, a plaintiff must establish that: (1) the product was defective and dangerous when put to a use reasonably anticipated by the manufacturer; and (2) the plaintiff sustained injury or damage as a direct result of the defect. *Blevins* v. *Cushman Motors*, *supra*, 551 S.W.2d at 607[2, 3]; *Rogers* v. *Toro Manufacturing Company*, 522 S.W.2d 632, 637[4-6] (Mo.App. 1975). And, in order to establish the first element of his case, a plaintiff has the burden to show both (a) that the defect existed when the product left the manufacturer's control and entered the stream of commerce, *Brissette* v. *Milner Chevrolet Company*, 479 S.W.2d 176, 181 (Mo.App. 1972),[1] and (b) that the product was being put to use reasonably anticipated by the manufacturer. *Keener* v. *Dayton Electric Manufacturing Company*, *supra*, 445 S.W.2d 365[6]; *Rogers* v. *Toro Manufacturing Com-*

---

[1] We equate this requirement with proof of ". . . a defect that was likely present when the maker surrendered possession and control." See W. Keeton, Products Liability, 50 F.R.D. 338, 341 (1970).

pany, supra, 522 S.W.2d at 637; Restatement (Second) of Torts § 402A, Comment h. (1965).

Fairly paraphrased, defendant's submissibility argument is that plaintiff failed to show the existence of any defect which would make the tire unreasonably dangerous when put to a reasonably anticipated use because: (1) there was no substantial evidence that there was any defect present when the maker surrendered possession; (2) the testimony of plaintiff's expert that the tire had a "kinked" bead wire is without probative value, and (3) the evidence establishes as a matter of law that plaintiff's injuries were caused by abnormal use of the tire. We set to one side the defendant's contention that its motion for judgment n.o.v. should have been sustained because plaintiff failed to adduce proof of the very defect pleaded. This case is very similar to *Nielson* v. *Armstrong Rubber Co.*, 570 F.2d 272 (8th Cir. 1978), upon the relevent law and facts, and the issue submitted must be regarded as having been tried by implied consent pursuant to Rule 55.33(b), Missouri Rules of Court (9th ed. 1978). *See Nielson* v. *Armstrong Rubber Co., supra,* 570 F.2d at 275[1,2]. We also bear in mind that when the submissibility of a plaintiff's cause is challenged on appeal, the plaintiff is entitled to the benefit of all the evidence construed in the light most favorable to the result reached, together with the reasonable inferences to be drawn therefrom. *Tucker* v. *Central Hardware Company,* 463 S.W.2d 537, 540 (Mo. 1971); *Winters* v. *Sears, Roebuck and Co.*, 554 S.W.2d 565, 569-570[6] (Mo.App. 1977), 89 A.L.R.3d 196, 202 (1977); *Lifritz* v. *Sears, Roebuck and Company,* 472 S.W.2d 28, 31[2] (Mo.App. 1971).

Defendant's assertion that the plaintiff adduced no substantial evidence of any manufacturing defect is obliquely put in terms of the admissibility of evidence, but its position is clear. As put, the argument is that the testimony of plaintiff's expert should not have been received because the expert did not examine the tire until October 1977, and there was no showing that the tire was in the same condition then as it was on July 22, 1970.

We conclude the proof was sufficient to show the existence of a defect on July 22, 1970. To begin with, the record justifies the inference that the tire was new and unused when the plaintiff attempted to mount it and was injured. Witness Pierson testified that the tires

he and plaintiff were mounting were taken out of stock, "wrapped in some wrappings." Pierson explained that "you take a knife and go between the two beads and cut the paper . . . and you clean the inside of the tire out." The "paper" or "trash" was then cleaned out of the tire, some "little plastic things" which separated the "beads" were removed, and the tire was mounted. One Boswell, plaintiff's "straw boss" at the time, testified that he examined the tire after plaintiff was injured. Being asked if the tire appeared to be in the same condition as it had been at the time of plaintiff's injury, Boswell replied, "It looks the way I remember it, yes."

By answer to interrogatories, defendant admitted it received the tire for inspection on August 20, 1970, and defendant's expert Ochs testified that photographs of the tire were taken about that time. Ochs had seen those photographs. The answers to interrogatories show the defendant returned the tire to plaintiff's employer in January 1971. Defendant was again in possession of the tire from November 1972 to April 25, 1973, when it was again returned to the plaintiff's employer, Tire Town of Springfield. This action, we note, was commenced in August 1974, although it was not tried until November 1978.

Ochs appeared at the trial. He was employed as "director of product analysis" for the Michelin Tire Corporation. He testified that he had seen the photographs taken in 1970, and based on his examination of those photographs and his examination of the tire in 1977, the tire appeared to be in the same condition "in terms of physical damages" as it was when it was first received by the defendant in August of 1970.[2] Mr. Ochs was asked about some raised striations (we count 12) which appear at intervals of about 6 1/2 inches around the circumference of the tire. Counsel referred to "those little marks." Mr. Ochs explained that the raised striations are called "mold flesh" and represent "excess" which oozes out during the manufacturing process. Ochs was also asked, "Can you tell whether or not this tire has ever been mounted before and run on the highway?" He

---

[2] The witness' response seems to have been qualified because there were yellow chalk marks on the tire. It was shown that the yellow chalk marks had been made by plaintiff's expert, Mr. Garvick.

answered, "I'd say from the condition of the tread face it has not been run."

When plaintiff's expert Garvick first saw the tire in 1977, it was still in possession of plaintiff's employer. Mr. Garvick testified that after he took possession of the tire, he measured the tread depth, and from this measurement he determined that the tire was a new tire which had never been in road service. This witness also observed the "vent lines (striations) from the segment[s] of the mold. . . ." He continued: "If the tire had been in service, of course, those would be worn, so I knew that the tire had not been in service but something happened to it before it got into service," Garvick also unequivocally stated that the "kinked beads" (the defect alleged to have caused plaintiff's injuries) had been produced at the time of manufacture. This witness also testified that he found no "external damage" to the tire.

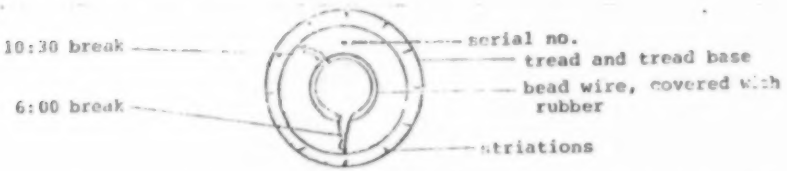
Perhaps the best evidence that the tire is in the "same condition" as it was at the time of the accident is the tire itself. As the tire appears before us, raised striations produced in the manufacturing process are clearly visible; it is obvious that the tire has not been used.

The rule is that the existence of a manufacturing defect may be proved by any species of evidence, direct or circumstantial, from which a jury may infer the existence of such defect without resort to conjecture and speculation. *Weatherford* v. *H. K. Porter, Inc.*, 560 S.W.2d 31, 33-34[2,3] (Mo.App. 1977); *Winters* v. *Sears, Roebuck and Co., supra*, 554 S.W.2d at 569[5], 89 A.L.R.3d at 202; *Brissette* v. *Milner Chevrolet Company, supra*, 479 at 181-182[5]. The testimony of an expert may constitute substantial evidence of a manufacturing defect in a tire, even though the tire has been used or partially destroyed. *Smith* v. *Uniroyal, Inc.*, 420 F.2d 438, 441-442[4] (7th Cir. 1970); *Brissette* v. *Milner Chevrolet Company, supra*, 479 S.W.2d at 181-182; *Firestone Tire & Rubber Co.* v. *King*, 145 Ga.App. 840, 244 S.E.2d 905, 908-910[1-4] (1978); *Mullen* v. *General Motors Corporation*, 32 Ill.App.3d 122, 336 N.E.2d 338, 344[4-6] (1975). In this case, the jury could reasonably infer: (1) that the tire was a new, unused tire when it exploded and injured the plaintiff; (2) that the tire had been repeatedly examined during the

long period which elapsed between the accident and the trial; two experts who examined it found no signs of use or external damage to the tire sufficient to cause the "bead wire" to break; (3) that in the opinion of Mr. Garvick, plaintiff's expert, the defect had been produced when the tire was manufactured, and (4) that at the time of trial the tire appeared to be a new tire except for the damage caused by the explosion. There was, therefore, substantial evidence that the tire was defective at the time it was sold.

Defendant further argues that the testimony of plaintiff's expert was without probative value because his opinion was not based on "fact, evidence, adequate data, or experience."

As is usually the case in products liability litigation, the evidence of defect is rather technical. The testimony can be understood if it is taken in connection with the exhibits, but of course the exhibits cannot be incorporated in this opinion. We have therefore prepared a very rough diagram of the tire which may be helpful if one conceives a tire as a series of concentric circles.



The tire itself is described as a Michelin tubeless 225-15 X. The serial number on the tire is F2613 01Y, and the experts present at the trial testified with this number "straight up" or "in the 12:00 o'clock position." We have made a few measurements with a flexible rule to indicate the approximate dimensions of the various parts of the tire. We measure the tread and tread base to be about 2 inches; the carcass measures about 4 inches and the "bead," which incorporates the "bead wire," measures about 2 inches. The "bead" is that part of the tire which seats against the rim of the wheel and holds it firmly in place. "Mounting" the tire involves preliminary lubrication of the tire and rim, then: (1) pushing the bottom bead into the "well" of the rim; (2) fitting the top bead of the tire onto the rim with a rotating metal "finger" which is part of the mounting device; (3) centering the tire, making sure a "hold down" device secures the wheel; and (4) inflating

the tire slowly until the "bottom" and the "top" beads seat. The recommended pressure for seating the beads is 40 p.s.i. [3]

The defect or defects which plaintiff's evidence tended to prove were "kinks" in the bead wire. Defendant's Exhibit "F" is a sample of the bead wire used by defendant in the manufacture of the tire in question. It appears to be a bundle of wires, but is in fact one larger wire with a continuous 9-wire outer wrap. Lengths of this wire are bent into a hoop which is spot welded. This wire, or bundle of wires, is then incorporated into the bead. Plaintiff's expert testified that the word "kink" as used in rubber technology actually refers to a "slight bend" in the bead wire, causing the bead to be "out of round." One of defendant's experts, Mr. Dunlop, testified that the word "kink" is a "very minor bend" involving "about a ten degree distortion from being straight."

Plaintiff's theory upon trial was that the tire exploded because the bead wire was "kinked." To prove this, plaintiff called one Kenneth R. Garvick. Mr. Garvick was retired, but did "consulting work" for his former employer. Mr Garvick's experience was as follows: In 1936, he graduated from Case School of Technology with a B.S. degree in chemical engineering. He "went directly to [work for] Firestone." For 17 years Mr. Garvick worked for Firestone; for 8 of those years, he was "involved in testing [and] quality control." While he was employed at Firestone, he continued his professional education. In 1953, Mr. Garvick was employed by the Mansfield Tire and Rubber Company; he became director of the tire engineering division of that company. As director of tire engineering, his responsibilities included development of the specifications for each tire that Mansfield made. From 1962 to 1977, Mr. Garvick had "handled the product liability claims that [had] come to trial." His experience included Michelin tires as well as other tires; he had measured and cut up other manufacturer's tires to "know what the industry [was] doing." Mr. Garvick subscribed to "industry [technical] service[s]."

Mr. Garvick first saw the tire at Tire Town. The tire is, by the way, a white sidewall tire, but the breaks are on the "black" or blackwall

---

[3] "P.s.i." means pounds of air pressure per square inch.

side. He observed breaks at the "6:00 o'clock position" and "the 10:30 position" and decided it would be a good idea to x-ray the tire because the center strand of the bead wire showed a "cup and cone" appearance at the site of both breaks. The "cup and cone" appearance indicated a "tension break." The cup and cone appearance is not readily visible to our eye, but photographs of the x-rays, particularly the photograph received as "Garvick Deposition Exhibit 7," clearly show that the broken center strand appears to be "cupped" on one side and "coned" on the other.

Mr. Garvick's opinion as to the cause of the breaks was given as follows:

"* * *

> My opinion on this — the breaks . . . are the result of kinks at those two locations at the time of manufacture, and this caused the bead to not be a complete circle, . . . [so] the bead hung up in those two locations and . . . the pressure stretched the beads beyond the wires' elastic limits in those two areas, and as a result, [the tire] broke . . . on the black side wall at what I call the [6:00] and [10:30] positions. . . ."

Mr. Garvick was asked how such defects could occur during manufacture of a tire. Michelin's insistence that its method of removing cured tires from the mold is fail-safe and *could not* have produced a kinked bead makes it important to note the language of his answer:

> "Well, the most commonplace [stage] would be [when] it's forced off the bead seating rings at the end of the curing cycle, *but it could be done other places*. That would be when you had a power failure where it's a mechanical failure that would interfere with its being removed and would twist the bead. (Our emphasis.)
>
> * * *"

This witness was questioned by defendant about his knowledge of Michelin tires. Mr. Garvick did not know how a Michelin tire was lifted from the mold in which it is made because he had never been in a Michelin plant. He did testify — on direct examination — that he was familiar with the segmented mold processes used by other tire manufacturers, but explained that "the bead part is solid on both sides, and

. . . is stationary [while the tire is being cured]." On cross-examination, Mr. Garvick repeated that the segmented mold process did not affect the bead.

Defendant vigorously argues that Mr. Garvick's opinion was not substantial evidence that the tire contained a manufacturing defect because his opinion was without support in fact, evidence, adequate data or experience. Defendant cites *Craddock* v. *Greenberg Mercantile*, 297 S.W.2d 541 (Mo. 1957) and *Gaddy* v. *Skelly Oil Co.*, 364 Mo. 143, 259 S.W.2d 844 (1953). The precedents cited undoubtedly have some relevance here, but they are not controlling. Here, the plaintiff's case does not rest wholly upon his expert's testimony, as was the case in *Craddock* and *Gaddy*. Unlike the cases cited by the defendant, Mr. Garvick's testimony was not based on wholly suppositious physical facts nor upon conditions assumed to exist.

Defendant's argument that Garvick's testimony cannot be accepted as substantial evidence is very diffuse. As we perceive it, defendant's point, as expanded in its brief, is that: (1) Garvick's opinion was not based on any facts known to him; (2) Garvick's experience was not sufficient to qualify him to testify about Michelin Tires; and (3) the fact that the "kinks" were destroyed by the explosion deprives his testimony of all probative value.

The first contention may be addressed shortly. Garvick examined a tire which was inferably a new tire; he made measurements and inspected the damaged area of the tire with a magnifying glass. Thereafter x-ray pictures of the broken bead were made under his supervision. He found a "cup and cone" appearance to the bead wire. He had first-hand knowledge about the tire and knew the tire had exploded. His inspection was sufficient to provide the basis for an opinion. *Tucker* v. *Central Hardware Company*, *supra*, 463 S.W.2d at 539-541; cf. *Lewis* v. *United States Rubber Company*, 414 Pa. 626, 202 A.2d 20, 22 (1964). [4]

The assertion that Garvick's expertise did not extend to Michelin tires is overstated. When the existence of a manufacturing defect in a

---

[4] See also W. Keeton, *supra*, n. 1, 50 F.R.D. at 342, discussing evidence of defects.

tire has been put in issue, the courts have generally looked to the extent of the proffered expert's experience, rather than his familiarity with a particular product. *See, e.g. Smith* v. *Uniroyal, Inc., supra,* 420 F.2d at 441-442[4]; *Edwards-Warren Tire Co.* v. *J. J. Blazer Const. Co.,* 565 F.2d 401, 404[3] (6th Cir. 1977). Complete knowledge about the field is not necessary. 3 J. Weinstein and M. Berger, Weinstein's Evidence, § 702[04], pp. 702-28 — 702-29 (1978). The assumption usually made by courts in assessing a proffered expert's knowledge of the details of a particular technology is ". . . that if the asserted expert emerges from a respectable professional environment, errors in the detail of factual information honestly assembled and imparted by capable preceptors and associates will tend to check against one another and produce a reliable aggregate."[5] That assumption was and is justified in Mr. Garvick's case.

The final aspect of this point deals with the condition of the tire at the time it was x-rayed. Mr. Garvick testified that the kinks in the bead were destoyed in the explosion, and were not visible in his photographs of the x-rays. Defendant would have it that because the kinks were destroyed, their existence could not reasonably be inferred.

This argument is neither novel nor convincing. In *Smith* v. *Uniroyal, Inc., supra,* the state police officer who investigated the accident testified there was a hole in the tread, part of which was missing. Inferably, a part of the bead flange was missing. One George Guernsey inspected the tire after the accident; thereafter it was destroyed or lost. Mr. Guernsey was nevertheless permitted to testify to the existence of a defect in the part of the tire which had been destroyed and the action of the district court was upheld on appeal. A similar contention was presented to the Georgia Court of Appeals in *Firestone Tire & Rubber Co.* v. *King, supra,* 145 Ga.App. 840, 244 S.E.2d at 909. The appellant manufacturer contended, among other things, that the precise nature of the manufacturing defect had not been established. The court held that the existence of a manufacturing

---

[5] 3 J. Weinstein and M. Berger, *supra,* n. 20, at p. 702-14, citing Maguire and Habesy, "Requisite Proof of Basis for Expert Opinion, 5 Vand.L.Rev.: 432, 433, 438 (1952).

defect could be inferred from circumstances, and continued, 244 S.E.2d at 909:

> "Furthermore, the defect in this case could not be directly observed [because] the material in the area of the blowout was destroyed by the blowout. To rule that this prevented [the plaintiff] from establishing a prima facie case would be to insulate manufacturers from liability . . . in any case where the defect causes its own destruction. Such a result would be totally untenable."

In this particular case, we agree with the Georgia court and find the defendant's argument untenable.

The third part of defendant's submissibility point is that the casualty and plaintiff's injuries were the result of his careless handling of the tire. The substance of this argument is that even though the tire was being used for an appropriate purpose — mounting on the rim of a wheel — plaintiff's failure to follow customary practices constituted misuse barring recovery. We realize that the law on this point is in a state of evolution — "flux" [6] but for the purpose of our analysis, we shall follow the view recognized by our Supreme Court, Dean Prosser and the Restatement. Careless handling is a species of abnormal use which bars recovery under the doctrine of strict liability. *Keener* v. *Dayton Electric Manufacturing Company, supra,* 445 S.W.2d at 365[6]; W. Prosser, Torts § 102 at 669 (1971); Restatement (Second) of Torts § 402A, Comment j. (1965).

Ordinarily, in "defect cases," as distinguished from "design cases," the issue of abnormal use is a question for the jury. [7] We regard it as a factual issue in this case.

Defendant's position may be summarized by saying that it contends plaintiff: (1) failed to apply lubricant when mounting the tire; (2) inflated the tire with an excessive amount of pressure; and (3)

---

[6] W. Keeton, Products Liability and Defenses — Intervening Misconduct, 15 The Forum 109, 111-116 (1979); D. Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk, 25 Vand.L.Rev. 93, 100-103 (1972).

[7] See D. Noel, *supra,* n. 6, 25 Vand.L.Rev. at 104-105.

failed to secure the tire to the tire mounting device before he started inflating it.

Plaintiff was an experienced tire changer. At the time the casualty occurred, plaintiff had been employed as a tire changer for a little more than 6 months. He estimated that before the accident, he had mounted about 15 Michelin tires "a day." Assuming plaintiff worked a normal 40-hour week, he had mounted about 1800 Michelin tires by July 22, 1970, when he was injured. Plaintiff described his procedure at the time of his injury by testifying that he first removed the rim with the "old tire" on it and "put the tire on the changer." The "changer" or mounting device is a flat circular metal plate mounted on a pedestal; the pedestal is attached to a circular metal base which has been screwed into a concrete floor. There is a threaded metal post in the center of the mounting platform. The threads accommodate a "lock nut" which secures the rim on the changer while the tire is being mounted.

Plaintiff "broke down" the old tire and Mr. Hamm handed him the "new tire" to be mounted. He then "soaped both beads, . . . soaped the rim" and started to mount the tire. He stretched both beads over the rim flange. Plaintiff's testimony was that when "you put [the tire] on [the mounting platform] and screw . . . [the] lock nut down, [the tire] automatically centers." He added that "sometimes they have devices that you set on there like cylinders that you put around the rim and it holds the bead up to the cylinder. . . ." There was such a cylinder here, and plaintiff used it. [8]

Plaintiff then began inflating the tire, without a valve core in the valve. He did not use a core [stem] because "you've got to air it all the way up to forty pounds so it'll seat, and then you let the air out so it will relax, and then you put the valve core in when you air it back up to the maximum pressure." Plaintiff admitted that sometimes he seated the beads by using more than 40 p.s.i., but on this particular occasion, plaintiff "counted" "one thousand, two thousand, three thousand,

---

[8] It is clear, in context that plaintiff was referring to the "Omega Bead Expander." Defendant's Exhibit "A," entitled "Michelin Mounting Procedure," directs the tire mounter to use this device "for difficult inflation."

four thousand, five thousand, and that's about forty pounds of air." Plaintiff knew this because he had mounted tires "many, many times before and it always worked out that way." Plaintiff amplified this answer by saying he meant when he had checked the air pressure with a gauge, his "five thousand count" had produced about 40 "pounds" of air.

At this point, the plaintiff was preparing to "[l]et the air hose off and let the air pressure back out [of the tire]" because the "top" (whitewall) bead had not seated. However, at the count of "five thousand," the tire exploded.

Upon trial, there was a good deal of controversy about the "lock nut." Mr. Coulter's testimony was that he had screwed the lock nut against the rim when he "centered" the tire on the mounting device. Thereafter, he loosened the lock nut slightly so the rim would not be "in a bind" when the tire was inflated to seat the bead.

There was evidence from which a jury could infer that if the plaintiff undertook to mount the tire in the manner to which he testified, he was following procedures ordinarily followed in the industry. It is true that the defendant adduced proof tending to indicate the plaintiff did not lubricate the tire before he attempted to mount it. Further, there is evidence from which it could readily be found that Mr. Coulter did not use the lock nut and that he overinflated the tire. This evidence might be restated in detail, but an extensive recountal of defendant's evidence would only demonstrate that a jury could reasonably have reached a different conclusion. It must be remembered that in jury-tried cases, an appellate court does not weigh the evidence; it merely determines whether there was competent and substantial evidence to support the jury's finding. *Diversified Metals Corp.* v. *Aaron Ferer & Sons, Inc.*, 498 S.W.2d 783, 785[2] (Mo. 1973); *Bonastia* v. *Terminal Railroad Ass'n of St. Louis*, 409 S.W.2d 122, 125[1] (Mo. 1966); *Pfingsten* v. *Franklin Life Insurance Company*, 330 S.W.2d 806, 816[11] (Mo. 1959). The jury was the sole judge of the credibility of the witnesses and the weight and value to be given their testimony and could believe or disbelieve any part of that testimony. *Thayer* v. *Sommer*, 356 S.W.2d 72, 77[6] (Mo. 1962). It is true, as the defendant asserts, submissibil-

ity is ultimately a matter of fact for the court. *Craddock* v. *Greenberg Mercantile, supra*, 297 S.W.2d at 548. It is also true that much of the evidence is circumstantial and that some of the inferences must be drawn by choosing between the conflicting opinions of experts. Nevertheless the jury had the function and the right to find some of the facts, even some facts essential to the plaintiff's case, by reasoning upon the evidence, including circumstantial evidence, and inferring from such evidence that a certain required thing or fact existed or was true. *Hart-Bartlett-Sturtevant Grain Co.* v. *Aetna Ins. Co.*, 365 Mo. 1134, 1149-1150, 293 S.W.2d 913, 923-924 (1956), cert. denied 352 U.S. 1016, 77 S.Ct. 562, 1 L.Ed.2d 548 (1957); *Hardwick* v. *Kansas City Gas Co.*, 355 Mo. 100, 107, 195 S.W.2d 504, 508[4], 166 A.L.R. 556, 561 (1946). We cannot say as a matter of law that it was error to submit that the tire was being used in a manner reasonably anticipated by the manufacturer when it exploded.

Defendant has briefed and argued two points alleging error in the exclusion of evidence. The first point, as stated, is that the trial court erroneously excluded evidence of the involvement of the Sentry Insurance Company in this cause. Defendant argues that "such evidence" was necessary to properly evaluate the deposition testimony of Mr. Robert Dunlop and to account for Mr. Dunlop's absence from the courtroom. In support of its point, defendant cites *Houfburg* v. *Kansas City Stock Yards Co. of Maine*, 283 S.W.2d 539, 548-549, (Mo. 1955); *Leavitt* v. *St. Louis Public Service Company*, 340 S.W.2d 131, 138[9] (Mo.App. 1960), and other cases which hold that the interest or bias of a witness and his relations to or feelings toward the parties or the case are never irrelevant matters, and that the pecuniary interest of a witness, or his bias or prejudice may always be shown, subject to such limitations as may be imposed by the trial court. Plaintiff counters with the argument that evidence of the involvement or interest of a workmen's compensation carrier was not admissible because such evidence tends to impede the injured man in the exercise of his right to receive full compensation. Plaintiff cites *Pritt* v. *Terminal R.R. Ass'n of St. Louis*, 251 S.W.2d 622, 625 (Mo. 1952).

It is a reasonable inference from the record that plaintiff's employer's workmen's compensation carrier joined in this action as a

subrogee. Nevertheless, the principle invoked by the defendant does not apply in this case. It is, and has been for many years, the rule in Missouri that a party may not directly impeach the credibility of his own witness. *Wells* v. *Goforth*, 443 S.W.2d 155, 159[6] (Mo.banc 1969). The rule has been relaxed as to witnesses who are adverse parties, *Wells, supra*, 443 S.W.2d at 159-160, but the witness defendant sought to impeach was not an adverse party.

Defendant had the benefit of testimony from three experts in tire technology. Mr. Ochs, who was called by the plaintiff, testified on cross-examination that the tire failed because of mismounting and overinflation. Mr. Avila, an independent expert called by the defendant, testified that he had examined the tire carefully and had the opinion that the tire had no manufacturing defect. Mr. Avila concluded that the tire failed because it had not been lubricated and had been overinflated.

Mr. Dunlop's deposition was taken in Florida on March 31, 1978. His credentials as an expert in tire technology are not questioned, but certainly the defendant was not obliged to rely on Mr. Dunlop as the only witness by which it could prove some element essential to its defense. Nor can it be said that the defendant was surprised; it had known of the contents of Mr. Dunlop's deposition for some time prior to trial. Nevertheless, defendant offered Mr. Dunlop's deposition and insisted it was entitled to show he had been employed by the workmen's compensation carrier for the plaintiff's employer. Upon plaintiff's objection, the trial court excluded parts of the deposition and some correspondence indicating that Mr. Dunlop had indeed been employed by the carrier. Otherwise, the deposition was admitted and read in evidence; Mr. Dunlop's testimony was very favorable to the defendant.

The rule in Missouri is that the introduction of a deposition or a part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party, unless the deponent is the adverse party. *Conner* v. *Neiswender*, 360 Mo. 1074, 1081, 232 S.W.2d 469, 473 (1950). In the case at hand, the defendant manifestly sought the benefit of Mr. Dunlop's testimony; the thrust of its argument here is that Mr. Dunlop was the most experienced and

competent expert who testified. Defendant, in effect, sought to have the benefit of Mr. Dunlop's testimony and increase the value of that testimony by showing his bias in favor of the plaintiff or his insurer. The trial court did not err in refusing to permit defendant to discredit its own witness. *Conner* v. *Neiswender, supra,* 360 Mo. at 1082, 232 S.W.2d at 474; *Dunn* v. *Dunnaker,* 87 Mo. 597, 600-601 (1885); *Woelfle* v. *Connecticut Mut. Life Ins. Co.,* 234 Mo.App. 135, 148-149, 112 S.W.2d 865, 872[7] (1938).

A further point advanced by the defendant is that the trial court erroneously refused to permit defendant to read parts of the plaintiff's deposition in evidence as part of the defendant's case because the parts of the deposition offered constituted substantive admissions on plaintiff's part.

The plaintiff's deposition was taken in September 1975; defendant's counsel used that deposition to impeach the plaintiff on cross-examination. Upon deposition, plaintiff testified that he had "no idea" what the air pressure in the tire was just before it blew up; that the tire "wouldn't go up right and when I aired it up, there it went, it blowed up." At the time the deposition was taken, plaintiff said he didn't remember if he used any lubricants in mounting tires on the day of the accident, and had "no idea" how far he had screwed the lock nut down on the mounting device before he began to inflate the tire. These and other inconsistent statements were put before the jury during defendant's cross-examination.

Defendant's point, slightly paraphrased, is that it should have been permitted to offer these inconsistent statements *again* as part of its case because the inconsistent statements of a party-opponent constitute substantive evidence.

There can be no doubt that a party's prior inconsistent statements, by deposition or otherwise, are admissible against him as substantive evidence in the nature of an admission. It is also true that such inconsistent statements are also admissible for the more limited purpose of impeachment. *Welch* v. *Hyatt,* 578 S.W.2d 905, 913[4] (Mo.banc 1979); *Pulitzer* v. *Chapman,* 337 Mo. 298, 318[3], 85 S.W.2d 400, 410-411[5-7] (banc 1935); *White* v. *Burkeybile,* 386 S.W.2d 418, 422-423[3] (Mo. 1965). And, our courts have defined

the term "admission" very generously; the testimony received as such need not be a direct admission of an ultimate fact in issue; it may be competent if it bears on the issue incidentally or circumstantially. *White* v. *Burkeybile, supra*, 386 S.W.2d at 422. So, we suppose, the fact that plaintiff "had no idea" or "did not remember" one or another evidentiary detail of his case on one occasion might conceivably have some probative value as an admission on another occasion when he could remember or had refreshed his memory. Even so, the trial court's ruling was not prejudicial. If, in a specific instance, a trial court excludes evidence which should have been admitted, the error is harmless if the same evidence is found in the testimony of the same or other witnesses given before or after the objection was sustained. *Boring* v. *Kansas City Life Insurance Company*, 274 S.W.2d 233, 238-239[7] (Mo. 1955); *Steffen* v. *Southwestern Bell Telephone Co.*, 331 Mo. 574, 583, 56 S.W.2d 47, 48[1-3] (1932); *Hastey* v. *Kaime*, 327 Mo. 1010, 1017, 297 S.W. 50, 52[3] (1927); *Moore* v. *St. Louis & S.F. Ry. Co.*, 267 S.W. 945, 949[9] (Mo.App. 1925). The point is without merit.

The final substantive point made by defendant is that the verdict is excessive, the trial court ignored its request for a remittitur, and a new trial should be granted. Here again, proper consideration of the argument requires some preliminary explication.

The explosion of the tire resulted in permanent injury to plaintiff's left forearm and to the left side of his skull. The injury to his left forearm is his disabling injury. Relying upon the record and that common fund of knowledge all educated men are presumed to have, we infer that there are two bones in the forearm — that part of the arm between the elbow and the wrist. If one extends his forearm prone (palm down) upon a flat surface, the bone which runs along the outside of the arm from the elbow to the wrist is called the *ulna*, the bone along the inside of the arm is called the *radius*. These two bones are articulated, i.e., jointed at the elbow and at the wrist. The articulations of the bones of the forearm permit a rotating movement of the hand described as pronation (hand palm down) and supination (rotation outward so the palm is up). The jointure of the ulna at the elbow permits flexion and extension of the forearm. Permanent damage to the ulna impedes both rotation of the hand in the manner

described and flexion and extension of the forearm. In this connection, it should be noted that the plaintiff is left-oriented, or as the parties have put it, left-handed.

Plaintiff was admitted to the intensive care unit of a Springfield hospital about noon on July 22, 1970. He was unconscious. Examination disclosed an open, comminuted fracture [9] of the left ulna a short distance below the elbow, dislocation of the radius at its articulation with the ulna and a fracture of the left zygoma, or cheekbone.

Plaintiff had suffered a concussion; he was examined by a neurosurgeon and was then taken to an operating room. A general anesthetic was administered. An orthopedic surgeon cleaned out the wound to plaintiff's left arm and, using a knife and scissors, removed all foreign material. The wound was enlarged slightly; the orthopedic surgeon then drilled a hole in the olecranon [10] and undertook to reduce and fixate the fracture by screwing a 6-inch bone screw into the broken bone, pushing the fracture fragments into place as the screw was advanced. At the last turn of the screw, "a snap was felt." The radius was then placed in its normal position, and a "long laceration of the forehead and lateral face" was repaired, together with several smaller lacerations about the face and mouth. A long cast was applied to plaintiff's left arm.

Six days later, plaintiff underwent another surgical procedure to repair his facial fracture. Plaintiff's left cheekbone was found to have been broken into fragments. The fragments were wired together and the bone was "formed." The wounds to the plaintiff's face were closed and a sterile bandage was applied. On August 3, 1970, the plaintiff was discharged from the hospital "to be followed on an outpatient basis."

Neither operation produced a satisfactory result. The plaintiff's orthopedic surgeon "followed [plaintiff] on a serial basis in [the surgeon's] office," but it became apparent the ulnar fracture was not healing. The physician suggested that reoperation might provide the plaintiff with a "better forearm." On December 10, 1970, plaintiff

---

[9] The term means denotes a break into several pieces.

[10] The process of the ulna which projects behind the elbow.

was again admitted to the hospital. Plaintiff's orthopedic surgeon then performed what is called a "sliding bone graft." The nature of this operation was graphically described by another orthopedic surgeon who examined the plaintiff on behalf of the defendant. This physician explained that plaintiff's left arm fracture had distinctive characteristics and was often called "Monteggia's fracture." He continued:

> ". . .[T]he head of the radius is displaced and all of the force goes on the upper part of the ulna, the large bone which is broken. This usually occurs about three inches below the elbow joint. And in such a fracture, the blood supply is somewhat interfered with. And instead of a good callous bone formation, scar tissue develops at the fracture site so the bone doesn't heal solidly, and it is called a non-union.
>
> Now when this condition occurs, the fracture site has to be exposed by surgical operation and scar tissue about the old fracture removed. The bone is freshened and then . . . the incision is extended down to expose [the] bone, and then a bone graft which is — it's really a slot of bone cut by a double saw — and then this new bone is slipped across the fracture site . . . and it's usually maintained by some type of fixation. In [plaintiff's] case, three metal screws were used."
>
> Counsel asked the witness to explain the use of the saw. The witness replied:
>
> "Usually, why, we have a two-bladed saw. That is run across along the shaft of the bone. Usually, a two-bladed saw is used because it gives a graft a proper proportion where it will fit snugly in the slot in which it is being placed."
>
> The interrogation then proceeded:
>
> "Q. So you actually take that saw and slice off a piece of the ulna bone itself? A. Yes, you just cut a slot out of the bone, yes."

The transcript shows that this physician had not studied the hospital records, but comparison of those records with his testimony indicates the witness accurately described the operation performed by plaintiff's orthopedic surgeon on December 11, 1970.

In April 1971, plaintiff was examined by a plastic surgeon because the scars around the facial fracture had widened and the zygomatic

bone, which makes up the lower portion of the eye socket, had sunk so there was a "defect of the left orbital rim." On April 20, 1971, plaintiff underwent a two-hour operation during which scars on the left forehead, eyebrow, upper and lower eyelids were excised; the wire which had been used to reduce the facial fracture was removed, and the rim of the bone below plaintiff's left eye was built up by using some sort of implant which was anchored to the underlying bone. On April 23, plaintiff was again discharged from the hospital. In June 1971, plaintiff returned to work.

The plaintiff's orthopedic surgeon examined his patient on March 31, 1978, in preparation for this trial. Upon examination, this physician found that plaintiff had a 15 percent loss of extention of his forearm, and 50 percent loss of forearm rotation — the pronation and supination which has been described. An x-ray was taken which showed that the three screws put in the ulna to hold the bone graft were still in place. The old injury to the bone was apparent but this physician thought the fracture was "probably healed." The elbow joint was beginning to show "wear and tear changes" which had been accelerated by plaintiff's original injury. This physician estimated the plaintiff had a 35 percent loss of use of his forearm.

The medical witness called by the defendant examined plaintiff on October 24, 1977, and again on November 6, 1978. This physician noted loss of plaintiff's ability to flex and extend his left forearm; the plaintiff's loss of motion had increased slightly between October 1977 and November 1978. This physician's testimony was similar to that given by the plaintiff's physician, except he testified that in his opinion, the fracture of the ulna would never heal. This physician noted, moreover, that because of plaintiff's loss of the rotating motion of his left forearm, plaintiff would be obliged to learn to do many things with his right hand which he had formerly done with his left. In November 1978, plaintiff had complained of pain in his left elbow after working.

To reiterate, the defendant's assignment of error, as briefed, is that "the jury's verdict of $140,000 in favor of the plaintiff was excessive, the [trial] court ignored defendant's motion requesting a remittitur, and a new trial should be granted." We find this argument unconvinc-

ing. We understand that, in this jurisdiction, excessive verdicts fall in two categories: (1) those verdicts reflecting simple excessiveness, and (2) those reflecting excessiveness by misconduct, where the result savors of bias and prejudice. *Walker* v. *Meder*, 609 S.W.2d 390, 391 (Mo.banc 1981); *Moore* v. *Glasgow*, 366 S.W.2d 475, 478 (Mo.App. 1963). As those cases and many others hold, simple excessiveness may be cured by enforced remittitur but excessiveness as a result of bias and prejudice requires a new trial. We also understand that a trial court has a discretion to order a remittitur which appellate courts do not have. *Nussbaum* v. *Kansas City Stock Yards Co. of Maine*, 359 S.W.2d 335, 341[6] (Mo. 1962). We further agree it is possible, even likely, that the trial court misconstrued the defendant's motion for new trial when it ruled the motion was insufficient to invoke that court's discretionary power to order a remittitur.

It does not follow that defendant is entitled to a new trial. In this court, defendant has abandoned its contention that the verdict is so grossly excessive as to reflect bias and prejudice, and the trial court's refusal, for whatever reason, to order a remittitur is a ground for *reversal* only when the trial court has abused its discretion. *Morris* v. *Israel Brothers, Inc.*, 510 S.W.2d 437, 447[13] (Mo. 1974); *Williamson* v. *Wabash R. Co.*, 355 Mo. 248, 256, 196 S.W.2d 129, 134[9] (1946); *Woodford* v. *Illinois Central Gulf Railroad Co.*, 518 S.W.2d 712, 718 (Mo.App. 1974). There is a rule of law — usually invoked in criminal cases — that a trial court's refusal to exercise a discretionary power properly invoked may require *remand* for the exercise of that discretion, *State* v. *Damon*, 350 Mo. 949, 955, 169 S.W.2d 382, 383[2] (1943), but that rule has not been invoked here and we decline to consider its application sua sponte. We find neither an abuse of the trial court's discretion, nor excessiveness in the size of the verdict.

Reduced to essentials, defendant's point is simply that the jury awarded too much — the verdict is excessive as a matter of law. The ultimate test is what fairly and reasonably compensates the plaintiff for the injuries sustained. *Graeff* v. *Baptist Temple of Springfield*, 576 S.W.2d 291, 309[18] (Mo.banc 1978). Applying that test here, we are unable to say the verdict is excessive. The plaintiff sustained

two severe permanent injuries. Between July 22, 1970, and June 1971, plaintiff underwent four surgical procedures which, with deference to skillful surgeons, have a good deal in common with everyday carpentry. Plaintiff testified that before and after the first two operations "[his] arm hurt and bothered him all the time. [His] face felt like it was about ready to break, and [he] couldn't hardly see out of his eye." Plaintiff had pain at the time of the second two operations, and nearly 7 years afterward, still complained of pain upon movement of his left arm.

The defendant's argument that no impairment of earning capacity can be inferred because the plaintiff has sustained no actual loss of earnings is unsound. *Kleinlein* v. *Foskin*, 321 Mo. 887, 906-907, 13 S.W.2d 648, 657-658 [14] (1929); *Baker* v. *Norris*, 248 S.W.2d 870, 875-876[9-12] (Mo.App. 1952). The plaintiff was a young, able-bodied man at the time he was injured. He is, or was, left-oriented. His manner of speech and discourse indicates he is not very well educated. He has always been employed as a manual laborer. The evidence clearly shows he has lost joint motion essential to the performance of any manual labor. A jury could reasonably infer a loss of capacity to work and earn, quite without the aid of expertise. We might prolong our discussion of this point, but it would serve no useful purpose. The contention is without merit.

A final contention must be noticed, although we cannot pass on it. Defendant asserts that the trial judge ate lunch with counsel for the plaintiff at a snack bar in the Greene County Courthouse on the third day of the trial. Speculating that members of the jury may have seen the judge in the company of counsel for the plaintiff, defendant asserts that the trial judge's conduct was improper and a denial of due process to the defendant.

It is the duty of an appellant to provide an appellate court with a record containing everything necessary to the determination of questions presented to it. *Ingram* v. *Civil Service Commission*, 584 S.W.2d 633, 635[4] (Mo.App. 1979). The point now being considered was raised in the motion for new trial, but was not supported by affidavit or otherwise as provided by Rule 78.05. Factual assertions in the brief cannot supplement the transcript. *In re Jackson's Will*,

294 S.W.2d 953[1] (Mo.App. 1956). There is nothing before us for review on this point.

We find no error in any respect briefed or argued in this court. Accordingly, the judgment is in all respects affirmed.

/s/ ROBERT E. HOGAN
Robert E. Hogan, Judge

BILLINGS, P.J., and MAUS, J., CONCUR

ON MOTION FOR REHEARING OR TRANSFER TO THE SUPREME COURT

PER CURIAM:

The appellant timely filed a motion for rehearing in this cause, earnestly arguing that this court had overlooked material matters of fact and had misinterpreted the law. The motion for rehearing was granted, and of course this left the appeal as if it had never been heard and the opinion filed became a nullity as if it had never been written. *In re McMenamy's Guardianship*, 307 Mo. 98, 116-117, 270 S.W. 662, 667[6] (banc 1925); *In re Thomasson's Estate*, 192 S.W.2d 867, 870[4-6] (Mo. 1946). The parties were free to brief or argue any point preserved for review, even though that point had not been mentioned upon the first submission. *Martin* v. *Southwestern Bell Telephone Co.*, 344 Mo. 83, 85-86, 125 S.W.2d 19, 20[4] (1939). However, the motion was not accompanied by any request to file new briefs or to raise or argue points not briefed when the appeal was originally submitted. We therefore ordered the cause resubmitted to the panel which originally heard the case upon the briefs originally filed and the arguments originally heard and recorded here. Cf. *Thummel* v. *King.*, 570 S.W.2d 670, 690[19] (Mo.banc 1978).

The cause has been given entirely fresh consideration. Upon rehearing, an appellate court may adopt its former opinion, modify or expand its former opinion, or adopt a new and different opinion, *Frohman* v. *Lowenstein*, 303 Mo. 339, 348, 260 S.W. 460, 461[1] (banc 1924); *State* v. *Barnes*, 517 S.W.2d 155, 169 (Mo.App. 1974), although it may not reverse its former holding without actual resubmission and rehearing of the appeal. *Granite Bituminous Paving Co.* v. *Park View R. & I. Co.*, 270 Mo. 698, 700-703, 196 S.W. 1142, 1144 (banc 1917). Upon fresh consideration of the entire record, we reach the same result. The opinion heretofore filed on August 13, 1981, is adopted as the opinion of this court.

Successive applications for rehearing are neither required nor can they be entertained. Rule 84.17, V.A.M.R. No further application for rehearing by the appellant is necessary. The motion to transfer to the Supreme Court is denied.

BILLINGS, P.J., and HOGAN and MAUS, JJ., CONCUR

IN THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI

Case No. 73927-2

NATHAN L. COULTER,

Plaintiff,

v.

MICHELIN TIRE CORPORATION,

Defendant.

JUDGMENT

Now on this 27th day of November, 1978, being one of the regular days of the Circuit Court of Greene County, Missouri, come the parties herein before Division 2 of the aforesaid Circuit Court, Plaintiff appearing in person and by Attorneys Benjamin J. Francka and Raymond E. Whiteaker, and Defendant appearing by Attorneys Flavius B. Freeman and Larry K. Bratvold. Both parties announce ready for trial. The jury pannel is sworn. Court and counsel conduct voir dire examination. A panel of 18 veniremen is qualified. A jury of 12 good and lawful, qualified persons being duly selected, was sworn to enter their verdict in the case as required by law. Jury Instruction No. 1 was read by the Court. Trial commences. Plaintiff makes opening statement to the jury. Defendant makes opening statement to the jury. Plaintiff presents evidence. Trial adjourns for the day at 4:56 p.m..

November 28, 1978. Trial resumes at 9:10 a.m. Both parties are present with the same appearances and all 12 members of the jury are present. Plaintiff presents further evidence. Plaintiff rests. Defendant files Motion For Directed Verdict at the close of Plaintiff's evidence, together with Suggestions in support thereof which is duly argued and submitted. Plaintiff dismisses all of Plaintiff's negligence theories in Count I without prejudice. Defendant's Motion for Directed Verdict at the close of Plaintiff's evidence sustained as to subparagraphs (a), (e), (f), (g), (h), (i), (j), and (k) of Paragraph 7 of Count II of

Plaintiff's Petition, and overruled with respect to subparagraphs (b), (c), and (d) of Paragraph 7 of Count II of Plaintiff's Petition. Except as set out herein Defendant's Motion for Directed Verdict at the close of Plaintiff's evidence is overruled. Defendant presents evidence. Trial adjourns for the day at 4:52 p.m.

November 29, 1978. Trial resumes at 9:02 a.m.. Both parties are present with the same appearances and all 12 members of the jury are present. Defendant presents further evidence. Defendant rests. Plaintiff offers no rebuttal evidence. Defendant's Motion For A Directed Verdict at the close of all evidence is filed together with Suggestions in support thereof, which is duly argued and submitted. Defendant's Motion For Directed Verdict at the close of all evidence is overruled. Trial adjourns for the day at 5:05 p.m.

November 30, 1978. Trial resumes at 9:00 a.m. Both parties are present with the same appearances and all 12 members of the jury are present. The jury is instructed by the Court. The Court reads Instructions 2 through 7, inclusive. The cause is thereafter argued to the jury by Attorneys for the Plaintiff and Attorneys for the Defendant. The Sheriff's Officer, Bailiff Swackhamer is duly sworn and charged by the Court. The jury is given written Instructions 1 through 7, inclusive. The jury retires to deliberate at 10:12 a.m. in charge of said Bailiff.

After due deliberation, the jury returns into open Court at 12:24 p.m. the following verdict:

> "We the undersigned jurors find the issues in favor of the Plaintiff, and assess Plaintiff's damages at One Hundred Forty Thousand Dollars ($140,000.00)."

Said verdict is signed by nine (9) jurors, to wit: John Walton, Mida Weaver, Judy West, Wilma Whittenburg, Carolyn Wade, Leonard R. Sims, Glen E. Parkison, Becky C. Wilcox, and Kathryn Stewart. The foregoing verdict was received and read in open Court and ordered filed by the Clerk. The jurors' verdict is approved and filed. The jurors are polled by Defendant. The jury is discharged.

Judgment is hereby entered for the Plaintiff and against the Defendant for the sum of One Hundred Forty Thousand Dollars

($140,000.00) on Count II of Plaintiff's Petition in keeping with the judgment and verdict rendered by the jury in this cause. Costs of this action are hereby assessed against the Defendant. Execution may issue.

SO ORDERED.

/s/ John C. Crow
Circuit Judge, Division 2

Dated: November 30, 1978
(Signed: March 21, 1979)

IN THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI
Division 2

NATHAN L. COULTER,

Plaintiff.

v.

MICHELIN TIRE CORPORATION,

Defendant.

ORDER

The Court has considered defendant's Motion for a Judgment in Accordance with Defendant's Motion for Directed Verdict at the Close of all of the Evidence or in the Alternative for a New Trial, the written suggestions of the parties and the oral arguments of February 15, 1979.

As observed during the oral arguments one is well within the evidence in arguing that the jury was generous in assessing plaintiff's damages. The Court has carefully considered whether some remedial action is called for regarding the amount of the verdict.

In considering the issue the Court has carefully noted that the only relief requested by defendant in its after-trial motion is judgment in its favor in accordance with its Motion for Directed Verdict at the Close of all the Evidence or, in the alternative, a new trial. Defendant has not suggested that it would be in order for the Court to grant relief by way of remittitur. [1]

Accordingly the Court has concluded it should not endeavor to grant unrequested relief, and that its attention should be limited to the relief defendant requested.

Restricting its consideration to the relief sought by defendant, the Court has concluded that no error occurred which would justify a new trial on all issues, and that defendant is not entitled to judgment in its

---

[1] See *P & S Leasing Company* v. *Ray Smith Ford, Inc.*, 533 S.W.2d 733 (Mo. App. 1977).

favor in accordance with its Motion for Directed Verdict at the Close of all the Evidence.

It is therefore ORDERED that defendant's Motion for a Judgment in Accordance with Defendant's Motion for Directed Verdict at the Close of all of the Evidence or in the Alternative for a New Trial, be, and the same is, hereby overruled in all respects.

Entered this 13th day of March, 1979.

/s/ JOHN C. CROW
John C. Crow
Circuit Judge

Distribution:

Benjamin J. Francka, Esq., 726 Woodruff Building, Springfield, MO 65806
Raymond E. Whiteacker, Esq., 600 Bank of Springfield Officer Center, Springfield, MO 65806
Flavius B. Freeman, Esq., and Larry K. Bratvold, Esq., 705 Woodruff Building, Springfield, MO 65806

No. 63487

IN THE SUPREME COURT OF MISSOURI

SD #63487

SEPTEMBER SESSION, 1981

NATHAN L. COULTER,

Plaintiff-Respodent,

v. TRANSFER

MICHELIN TIRE CORPORATION,

Defendant-Appellant

Now at this day, on consideration of Appellant's Application to transfer the above entitled cause from the Southern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI — SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1981, and on the 10th day of November 1981, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City this 10th day of November 1981.

/s/ Thomas F. Simon, Clerk.

/s/ By: Norma Jean Creach D.C.

IN THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI

Case No. 73927-2

NATHAN L. COULTER, *Plaintiff*,

v.

MICHELIN TIRE CORPORATION, *Defendant*.

DEFENDANT'S MOTION FOR A JUDGMENT IN ACCORDANCE WITH DEFENDANT'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL OF THE EVIDENCE OR IN THE ALTERNATIVE FOR A NEW TRIAL

Comes now defendant, Michelin Tire Corporation, and moves the Court to set aside the verdict of the jury and to enter judgment in favor of the defendant in accordance with its Motion For Directed Verdict At The Close of All The Evidence, or if the foregoing motion be denied to set aside the verdict and the judgment entered thereon and grant defendant a new trial for the following reasons:

1. No evidence has been offered or received which raises a jury issue on the allegations contained in paragraph 7 subparagraph (b), (c) and (d) of Count II of plaintiff's Complaint that the tire in question was in a defective condition. Therefore, a verdict should have been directed in favor of defendant.

2. No evidence has been offered or received which raises a jury issue on the allegations contained in paragraph 7 of Count II in plaintiff's Complaint that the tire in question was unreasonably dangerous. Therefore, a verdict should have been directed in favor of defendant.

3. The Court erroneously admitted into evidence plaintiff's exhibit 1, a certain 225-15X Michelin radial tire, without a proper foundation having been laid for the admission into evidence of said tire as to whether said tire was the tire involved in plaintiff's accident and whether it was in substantially the same condition at the time of trial as it was at the time of the accident on July 22, 1970. The

erroneous admission of said tire was highly prejudicial to the defendant. Therefore, a new trial should be granted.

6. Contrary to Missouri Supreme Court Rule 57.07 (a)(2) which provides without qualification that "The deposition of a party, . . . may be used by an adverse party for any purpose. "the Court erroneously prevented the defendant from reading into evidence, as part of the defendant's case and in support of defendant's claim of contributory fault, several portions of plaintiff's deposition testimony which defendant offered as admissions of a party opponent and substantive evidence of said contributory fault. The Court's action in excluding such deposition testimony deprived the defendant of one of its primary sources of substantive evidence of the conduct that plaintiff caused his injuries through his own contributory fault. The portions of plaintiff's deposition testimony so excluded have been attached to this motion and marked Exhibit D. The erroneous exclusion of such deposition testimony was highly prejudicial to the defendant. Therefore, a new trial should be granted.

7. The Honorable John C. Crow, Circuit Judge for the Circuit Court of Greene County, Missouri, did between the hours of 12:30 p.m. and 1:15 p.m. on the 29th day of November, 1978, which was the third day of the trial, eat lunch with counsel for the plaintiff, Mr. Raymond Whiteaker, at a corner table at an open public snack bar in the Greene County Court House. The Honorable John C. Crow and Mr. Raymond Whiteaker were seated by themselves eating lunch and talking to one another, at which time they were observed by one of defendant's counsel of record and Mr. Jack Friedmann, a member of the New York Bar, who is house counsel for defendant Michelin Tire Corporation. The conduct of the Honorable John C. Crow in eating lunch and having conversation with counsel for the plaintiff in an open public snack bar within the Court House during the trial and at a time when the jurors had also been released for a lunch period and were free to observe the conduct of Honorable John C. Crow in having lunch and conversation with Mr. Raymond Whiteaker, plaintiff's counsel, was improper and highly prejudicial to the defendant and may have created the impression that the Honorable John C. Crow favored the counsel of the plaintiff or the plaintiff's position in the lawsuit. Therefore, a new trial should be granted.

8. The verdict of the jury in favor of the plaintiff was against the weight of the evidence and against the weight of the credible evidence. The opinion testimony of plaintiff's expert was not based upon sufficient facts in evidence. The testimony of plaintiff was contrary to the physical facts and therefore not credible. Plaintiff's testimony was completely refuted by all three witnesses to the accident who were disinterested in the outcome of the litigation. Therefore, a new trial should be granted.

9. The jury's verdict in the amount of $140,000 was grossly excessive for the reasons that plaintiff was only able to prove special damages of approximately $7,000.00 including $3,500.00 in medical expenses and $3,500.00 in lost wages, all of which accrued between July 22, 1970, and May 31, 1971. There also was no proof of a diminished earning capacity and immediately after returning to work plaintiff earned more pay in his same job for more than 4 years before voluntarily leaving for a better job. The disfigurement to plaintiff's face and left arm and the limitation of motion of his left arm were shown to be only minimally disabling. The excessive verdict is therefore not based upon the evidence but is obviously the result of bias in favor of the plaintiff and prejudice against the defendant. Therefore, a new trial must be granted.

10. In the event the court finds the verdict for plaintiff was excessive but was not so grossly excessive as to indicate bias and prejudice on the part of the jury, defendant requests the court to require plaintiff to remit a substantial portion of said judgment as may be determined by the court, or, in the alternative that the court grant a new trial to defendant.

11. Mr. Raymond Whiteaker, during his closing argument improperly argued outside the bounds of the facts in evidence or reasonable inferences from said facts. He stated to the jury that he would show them how the kinks got in the bead of the tire. He placed the tire on the floor and asked the jury to imagine that the tire was in the mold. Then he quickly reached down, grasped the bead of the tire at the location of the breaks, and violently jerked the tire upward stating, "That's the way those kinks got in the tire. Look at where my hands are." There was no evidence that the tire had been so violently

treated nor that such treatment could cause kinks in the bead. Such theatrics were beyond the bounds of permissible argument and highly prejudicial to defendant. Therefore, a new trial should be granted.

WHEREFORE, defendant prays the Court to enter its order granting defendant's Motion for a Judgment in Accordance with its Motion for Directed Verdict or in the Alternative for a new trial.

NEALE, NEWMAN, BRADSHAW & FREEMAN

by Flavius B. Freeman

by Larry K. Bratvold

Woodruff Building
Suite 705
P.O. Box 1035 S.S.S.
Springfield, Missouri 65805

Attorneys for Defendant

IN THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI

Case No. 73927-2

NATHAN L. COULTER, *Plaintiff*,

v.

MICHELIN TIRE CORPORATION, *Defendant*.

SUGGESTIONS IN SUPPORT OF DEFENDANT'S MOTION FOR A JUDGMENT IN ACCORDANCE WITH DEFENDANT'S MOTION FOR A JUDGMENT AT THE CLOSE OF ALL OF THE EVIDENCE OR IN THE ALTERNATIVE FOR A NEW TRIAL

Comes now defendant, Michelin Tire Corporation, and submits the following Suggestions in support of its Motion For A Judgment In Accordance With Defendant's Motion For A Judgment At The Close Of All Of The Evidence Or In The Alternative For A New Trial, to wit:

1. In response to defendant's Motion For A Directed Verdict At The Close Of Plaintiff's Evidence all of the allegations contained in plaintiff's complaint concerning the condition of the tire were dismissed without prejudice with the exception of those contained in subparagraphs (b), (c) and (d) of paragraph 7 of Count II.

No evidence was offered or received which raised a jury issue on the allegations contained in subparagraphs (b), (c) and (d) of paragraph 7 of Count II that the tire in question was defective in any of the respects therein alleged. Therefore, a verdict should have been directed in favor of defendant.

In subparagraph (b) plaintiff alleged that the bead wires were weak or thin at one or more places. This allegation does not fit the facts of this case.

The court's ruling excluded from evidence one of defendant's primary sources of positive proof that the plaintiff had caused his own injuries by his contributory fault. The ruling of the court was clearly

erroneous. The error was very prejudicial to the defendant in that it limited its positive proof of plaintiff's conduct and the scope of its argument to the jury. It deprived defendant of a fair trial. Therefore, a new trial must be granted.

7. The conduct of the Honorable John C. Crow, Circuit Judge for the Circuit Court of Greene County, Missouri, in having lunch and conversing with counsel for the plaintiff in a public snack bar in the Greene County Court House on the third day of the trial was inappropriate conduct for a Circuit Judge. It was inappropriate because the jury had also been released for lunch and had free access to the snack bar where the Judge and counsel for the plaintiff were eating together. The conduct of the Judge may have created the impression that the Judge favored the plaintiff's counsel or the plaintiff's position in the lawsuit.

The Missouri Code of Judicial Conduct, Canon 2 provides as follows:

> The Judge Should Avoid Impropriety and the Appearance Of Impropriety in his Official Activities
>
> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; *nor should he convey or permit others to convey the impression that they are in a special position to influence him*. He should not testify voluntarily as a character witness.

In the Commentary following the text is stated:

> *A judge must avoid all impropriety and appearance of impropriety in his official activities. He must expect to be the subject of constant public scrutiny*. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The Honorable John C. Crow as an experienced trial lawyer and Circuit Judge is well aware that a small action by a trial judge can

greatly affect the outcome of a lawsuit. He is also aware that his actions are watched closely by the jurors as well as the lawyers involved in a lawsuit. Defendant is helpless to prove what effect the Judge's conduct may have had upon any of the jurors. In a case such as this one where the corporate defendant was obliged to contend not only with the factual issues but with the obvious sympathies that favored the plaintiff, the conduct of the trial judge, if observed by a juror, may have had a psychological impact which distracted that juror's attention from the factual issues. It may well have deprived the defendant of the one vote which would have defeated the plaintiff's verdict. Clearly the conduct was inappropriate for a trial judge.

Such inappropriate conduct can not be overlooked. It was highly prejudicial to defendant and deprived the defendant of a fair trial. Therefore, a new trial must be granted.

8. The verdict in favor of plaintiff and against the defendant on the issue of liability was against the great weight of the evidence. Specifically, the verdict was against the weight of the evidence on the factual issues concerning the alleged defective condition of the tire and the manner in which plaintiff had used the tire.

First of all, the testimony of Mr. Garvick, plaintiff's expert, was so incredible and lacking in probative value that a verdict based on his testimony must be set aside. Mr. Garvick admitted he had never examined a Michelin tire in the field of commerce before he examined this one. He admitted that he had never seen a Michelin tire manufactured nor had he seen a Michelin tire mold like the one used to make the tire involved in this case. He admitted that there was no tangible or observable evidence of a defect in the tire. He further admitted that this tire was the first one that he had ever seen that contained two breaks in a bead of the tire.

* * * *

IN THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI
Division 2

Case No. 73927-2

NATHAN L. COULTER, *Plaintiff*,

v.

MICHELIN TIRE CORPORATION, *Defendant*.

PLAINTIFF'S SUGGESTIONS IN OPPOSITION TO DEFENDANT'S MOTION FOR A JUDGMENT IN ACCORDANCE WITH DEFENDANT'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL OF THE EVIDENCE OR IN THE ALTERNATIVE FOR A NEW TRIAL

Defendant in the instant motion requests the Court to set aside the jury's verdict and enter judgment in favor of Defendant in accordance with Defendant's Motion for Directed Verdict At The Close Of All Of The Evidence or in the alternative to grant defendant a new trial.

Defendant's motion is in eleven enumerated points suggesting why said motion should be sustained. Plaintiff will respond to each point as briefly as possible.

To state a well known rule of law, Defendant is not entitled to a directed verdict unless Plaintiff totally fails to make a submissible case on any theory of liability and reasonable minds could not differ on the proper disposition of the case. See, *Connizzo* v. *General American Life Insurance Company*, 520 S.W.2d 661 (Mo. App. 1975). In making such a determination the Court must consider the evidence in light most favorable to the Plaintiff, together with the benefit of all reasonable inferences which might be reasonably drawn from the evidence, disregarding any evidence or inferences adverse to the Plaintiff. *Stevens* v. *Raney*, 520 S.W.2d 615 (Mo. App. 1975); *Reed* v. *Shelly*, 378 S.W.2d 291 (Mo. App. 1964); *Abel* v. *Campbell 66 Exp., Inc.*, 378 S.W.2d 269 (Mo. App. 1964).

It logically follows that if reasonable minds could differ as to the sufficiency of the evidence in support of Plaintiff's claim and whether Plaintiff was entitled to recover, the Court cannot properly sustain a motion for directed verdict in favor of the Defendant. See, *W. Crawford Smith, Inc.* v. *Watkins*, 425 S.W.2d 276 (Mo. App. 1968). Thus, it should be noted at the outset that Defendant carries a very heavy burden in seeking to establish that it is entitled to a verdict as a matter of law; one which Defendant in this case clearly fails to meet.

Plaintiff objected to the reading of the questions and answers that had previously been read by defendant's counsel in his cross examination of the plaintiff. The basis of the objection was not that they were not properly presented as admissions against interest, but rather that the defendant's counsel reading of them a second time and that this was repititious. They were already before the jury, therefore the Court properly sustained the objection because it in fact was repititious. The evidence was already in. Defendant argues that it may use the depositions for both impeachment and admissions but that the court through its ruling, in effect, stated that the deposition could be used for either impeachment or admissions, but not both. This argument is without logic. If the deposition was read once then the statements made in the deposition could obviously be used to impeach the plaintiff if he testified inconsistently. On the other hand those same statements could be construed as admissions. Defendant seems to be arguing that in order to be used for impeachment and as an admission, the statements must necessarily be read twice and apparently would have to be designated as impeachment on one occasion and as an admission on the other hand, but that it could not serve both purposes by being read only once. In any event, the statements made in the deposition were received into the evidence and read to the jury. They were all before the jury. Under these circumstances it is difficult to see how defendant could have been prejudiced the jury, was well aware of the contents of the statements.

7. In point seven of defendant's motion defendant states that "the Honorable John C. Crow, Circuit Judge for the Circuit Court of Greene County, Missouri, did between the hours of 12:00 and 12:30 p.m. and 1:15 p.m. on the 29th day of November, 1978, which was the third day of trial, eat lunch with one of plaintiff's counsel, Mr.

Raymond Whiteaker, at a corner table at an open public snack bar in the Greene County Courthouse."[9] It should be specifically noted that the aforementioned encounter between the Honorable Judge Crow and Attorney Whiteaker was very *brief*, that there were *no jurors present*, that the *case was in no manner discussed* and that *defendant voiced no objection* to the conduct which it now complains of, *made no record* regarding this alleged inappropriate conduct, and furthermore *did not request a mistrial*.

The court can take judicial notice of the fact that the public snack bar referred to by defendant is of course quite small and as a result necessitates persons being in close proximity to one another. Under these circumstances it is hard to imagine how such conduct could be construed as conveying the impression that plaintiff's counsel was in a special position to influence the judge.

Even assuming that the aforementioned encounter between the Honorable Judge Crow and Attorney Whiteaker could somehow be construed as prejudicial, defendant waived any such prejudice through its failure to voice any objections to the conduct or request a mistrial. It should be specifically noted that the silence of defendant preserved nothing for review. See Rule 84.13 of the Missouri Rules of Civil Procedure. If counsel considered such matter prejudicial counsel should have requested a mistrial or should have requested the court to inquire into the matter further. Even if plaintiff would seek to invoke the plain error rule as provided by Rule 84.13(c) of the Missouri Rules of Civil Procedure which said rule plaintiff would argue is inapplicable, defendant should be barred by taking refuge in such rule, for the rule is not intended as a refuge for the maladroit or neglectful. See *Stevens* v. *Wettererou Foods, Inc.*, 501 S.W.2d 494 (Mo. App. 1973).

* * * *

---

[9] See page 21 of Defendant's Suggestions.

No. 11,336

In The
Missouri Court of Appeals
Southern District

NATHAN L. COULTER,
Plaintiff-Respondent,

v.

MICHELIN TIRE CORPORATION,
Defendant-Appellant.

**Appeal From The Circuit Court Of
Greene County, Missouri, Division Two
Honorable John C. Crow, Judge**

DEFENDANT-APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

NEALE, NEWMAN, BRADSHAW & FREEMAN
FLAVIUS B. FREEMAN No. 10575
705 Woodruff Building
Springfield, Missouri 65806

JOHN M. KENNEY
Of Counsel
3003 New Hyde Park Road
New Hyde Park, New York 11042
Attorneys for Appellant

Oral Argument Requested

* * * *

V.

The Conduct Of The Honorable John C. Crow, Trial Judge In This Cause, In Eating Lunch And Having Conversation With Counsel For Plaintiff In An Open Public Snack Bar Within The Courthouse During The Third Day Of The Trial At A Time When The Jury Had Also Been Released For Lunch Period And Were Free To

Observe Such Conduct Of The Honorable John C. Crow, Was Improper And Highly Prejudicial And Constituted A Denial Of Due Process To The Defendant In That Such Conduct May Have Created The Impression That The Honorable John C. Crow Favored Those Identified With The Plaintiff Or The Plaintiff's Position In The Lawsuit And Such Impropriety Could Not Be Properly Cured During The Trial Without Further Prejudicing The Defendant In The Eyes Of The Jury And The Judge.

The conduct of the Honorable John C. Crow, Circuit Judge for the Circuit Court of Greene County, Missouri in having lunch between the hours of 12:30 p.m. and 1:15 p.m. on the third day of the trial and conversing with counsel for plaintiff at a corner table where the two of them were eating together in a public snack bar in the courthouse, was inappropriate conduct for a Circuit Judge. They were observed by one of defendant's counsel and the member of the New York Bar who was a lawyer in the office of outside general counsel for Michelin Tire Corporation for products liability matters. They came into the lunchroom shortly before 1:00 p.m. and were only there briefly. It was particularly inappropriate because the jury had also been released for lunch and had free access to the open snack bar. Obviously they were free to observe the conduct of the trial judge having lunch and conversing with one of plaintiff's counsel. The conduct of the judge was improper and prejudicial to defendant and may have created the impression that the trial judge favored the counsel for plaintiff or the plaintiff's position in the lawsuit. (Tr. 558)

The title of Canon 1 of the Missouri Code of Judicial Conduct states:

> "A Judge Should Uphold the Integrity and Independence of the Judiciary"

Irrespective of the purpose of the judge and plaintiff's counsel eating together — which we are more than willing to assume was solely for the purpose of being sociable — we do not feel this type of conduct under these circumstances qualifies as to the high standard of conduct contemplated "so that the integrity and independence of the judiciary may be preserved."

The title of Canon 2 of the Missouri Code of Judicial Conduct is as follows:

"A Judge Should Avoid Impropriety and the Appearance of Impropriety in His Official Activities"

Obviously this Canon contemplates more than impropriety or the appearance of impropriety in his official duties. In fact the language of the Canon seems obvious to set a standard for social conduct and requires that he should not convey or permit others to convey the impression that they are in a special position to influence him. The activity with which we are concerned here certainly conveyed that impression, even assuming it was entirely unintentional, to Michelin's New York counsel and could hardly do otherwise with such members of the twelve person jury as may have eaten lunch or had coffee in the snack bar.

The language of Canon 2 provides:

"A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness."

In the Commentary following the text it is stated:

"*A judge must avoid all impropriety and appearance of impropriety in his official activities. He must expect to be the subject of constant public scrutiny.* He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." (Emphasis supplied)

The Honorable John C. Crow as an experienced trial lawyer and Circuit Judge is well aware that a small action by a trial judge can greatly affect the outcome of a lawsuit. He is also aware that his actions are watched closely by the jurors as well as the lawyers involved in a lawsuit. Defendant is helpless to prove what effect the Judge's conduct may have had upon any of the jurors, who only voted

9 to 3 in favor of the plaintiff. In a case such as this one where the corporate defendant was obliged to contend not only with the factual issues but with the obvious sympathies that favored the plaintiff, the conduct of the trial judge, if observed by even one juror, may have had a psychological impact which distracted that juror's attention from the factual issues. It may well have deprived the defendant of the one vote which would have defeated the plaintiff's verdict. Clearly the conduct was inappropriate for a trial judge.

The Canons of Judicial Ethics admonish judges to avoid "even a suspicion of unfairness" by being careful about their "utterances, tone of voice or general attitude." *Duncan* v. *Pinkston*, 340 S.W.2d 753, 757 (Mo. 1960). Courts have recognized the powerful effect which even unintentional acts of a judge may have on a jury:

> In the eyes of the jury the trial judge is the epitome of justice and wisdom. His influence upon the jurors is immense. A trial judge is obligated to maintain strict impartiality as between the adverse parties to a lawsuit. Jurors are quick to detect and respond to his slightest inclination toward or against either side of a lawsuit; to condemn the side which he condemns and to approve the party litigant or the cause upon which he smiles. *Wright* v. *Richmond*, 21 Mo. App. 76. It is easy for a trial judge, unintentionally to prejudice a jury for or against one party or another. He must be extremely cautious in his comments, considerate in his rulings, and thoughtful, patient and forbearing in his conduct. Any appearance of partiality, favoritism or persuasion one way or the other is strictly to be eschewed. *Harms* v. *Simkin*, 322 S.W.2d 930, 938 (St. L. App. 1959).

Ethics rulings have repeatedly cautioned the bench and bar to avoid ex parte communications. See Canon 3(a)(4) and comments, Thode, Reporter's Notes to Code of Judicial Conduct, p. 11-13, A.B.A. Informal Opinion 251 (Maru, 1970 Supp. to Digest of Bar Ass'n Ethics Opinions #4980); Opinion 1-1962, (Maru, 1975 Supp. to Digest of Bar Ass'n Ethics Opinions #8387) 11 Res Gestae 20 (July-August, 1967). The A.B.A. House of Delegates has even recognized the effect of lunch arrangements on the administration of justice:

> Particularly to be avoided are physical arrangements under which judges and prosecutors share a lunchroom from which

> defense counsel are excluded. Any appearance that suggests a special relationship between the district attorney's office and the judiciary is certain to create doubts concerning the impartial administration of justice. A.B.A. Standards Relating to the Function of the Trial Judge, § 1.5, p. 34 (1972 Approved Draft).

It is elemental that a "fair trial in a fair tribunal is a basic requirement of due process," *In re Murchison*, 349 U.S. 133, 136 (1955). Prejudicial influences on a jury can and should constitute a denial of due process and a basis for reversal. *Edwards* v. *Sears, Roebuck and Co.*, 512 F.2d 276, 281 (5th Cir. 1975).

Such inappropriate conduct can not be overlooked. It was highly prejudicial to defendant and deprived the defendant of due process. Therefore, a new trial must be granted.

* * * *

In The
Missouri Court of Appeals
Southern District

No. 11,336

NATHAN L. COULTER,
Plaintiff-Respondent,

v.

MICHELIN TIRE CORPORATION,
Defendant-Appellant.

Appeal From The Circuit Court Of
Greene County Missouri, Division Two
Honorable John C. Crow, Judge

STATEMENT, BRIEF AND ARGUMENT OF PLAINTIFF-RESPONDENT NATHAN L. COULTER

BENJAMIN J. FRANKA, #15009
726 Woodruff Building
Springfield, Missouri 65806

WOOLSEY, FISHER, WHITEAKER,
MCDONALD & ANSLEY
RAYMOND E. WHITEAKER, #15574
JOHN E. PRICE, #28150
Suite 600, Bank of Springfield
300 South Jefferson
Springfield, Missouri 65806

Attorneys for Respondent

ORAL ARGUMENT REQUESTED

* * * *

V.

The Conduct Of The Honorable John C. Crow In Eating Lunch And Having Brief Social Conversation With Counsel For Plaintiff In The Snack Bar Of The Courthouse During The Third Day Of The Trial Was Not Improper, And Defendant Has Waived Any Claim That It's Constitutional Rights Were Violated By Such Conduct In That Defendant Failed To Raise Such Claim At Its Earliest Possible Opportunity In The Trial Court And Defendant Has Failed To Assert That Any Prejudice Resulted To Do It As A Result Of Such Conduct.

On the third day of trial, the trial judge and all counsel conferred for some time after the jury had been released for a lunch break (Tr. 437). Shortly before 1:00 p.m., and after the jurors had returned to the courtroom, it is alleged that the Honorable John C. Crow, Circuit Judge for the Circuit Court of Greene County, Missouri, and counsel for plaintiff sat together very briefly in the Courthouse Snack Bar while eating lunch. Defendant contends that the judge's action was improper and resulted in a denial of due process of law to defendant, requiring a new trial.

Initially, plaintiff would submit that any error which may have occurred was not properly presented to the trial court or preserved for review. Defendant has gone totally outside the record to state its claims of error. A review of the transcript reveals absolutely no reference to the alleged incident during the trial until defendant filed its after trial motion for judgment or in the alternative, a new trial (Tr. 554-563). By virtue of its silence, defendant prevented the trial court from undertaking to determine if any juror had, in fact, witnessed this alleged rendezvous and, if so, what effect it might have had upon the deliberations. Defendant in effect sandbagged the trial judge until the conclusion of the trial and the rendition of an adverse verdict, and then belatedly attempted to raise a claim of denial of due process of law.

Missouri law is clear that a constitutional issue must be raised at the earliest opportunity. *City of Olivett* v. *Grader*, 369 S.W.2d 85 (Mo. 1963); *May Furnace Co.* v. *Conaway*, 352 S.W.2d 40 (Mo. 1962). "If a constitutional issue is not properly raised at the trial level, nothing in the nature of a constitutional issue exists to be preserved for

appellate review." *Oliver* v. *City of Higginsville*, 527 S.W.2d 690 (Mo. App. 1975). Regardless of the merits of defendant's claim of error, the issue has not been properly raised and preserved and is not before the Court at this juncture.

However, even if the Court were to consider the merits of defendant's claim of error under a plain error standard of review, it is clear that the trial judge's action was not improper and that defendant had failed to allege or establish that it suffered any prejudice as a result of this action. Any discussion which occurred between the Honorable John C. Crow and counsel for plaintiff was purely social in nature, and defendant has so conceded. The Code of Professional Responsibility, adopted in Missouri as Supreme Court Rule 4, and specifically EC 7-35 and DR 7-110(b) thereof, specifically prohibit ex parte communications between counsel and a judicial tribunal involving discussion of the issues of a pending matter. There is no similar prohibition of purely incidental contact between an attorney and the trial judge. The absence of any case law or ethical advisory opinions on this subject indicates that the alleged conduct of the trial judge and plaintiff's counsel was neither onerous nor improper and that defendant's contention has no merit.

Nevertheless, even assuming that the alleged action could be construed to be improper, defendant has totally failed to allege or demonstrate any actual prejudice as a result of the action. Nowhere in defendant's after trial motion and suggestions in support of that motion, or in defendant's brief on appeal, is there any intimation that a single juror saw or was aware of the alleged episode. In this regard, the cases of *Duncan* v. *Pinkston*, 340 S.W.2d 753 (Mo. 1960); *Wardenburg* v. *White*, 518 S.W.2d 152 (Mo. App. 1973); and *Harms* v. *Simkin*, 322 S.W.2d 930 (Mo. App. 1959), are all factually distinguishable. Those cases all involved conduct of a trial judge in the courtroom in the presence of the jury. The appellants in those cases were at least able to assert a colorable claim that they had been prejudiced by the trial judge's actions. Defendant's claim here is based wholly in speculation and conjecture. Such surmise does not furnish a sufficient ground for a finding of prejudice to the defendant.

As is stated 88 CJS Trial, Section 51, Page 138, "private communications or conferences between the judge and one of counsel

. . . while not commendable, ordinarily are not prejudicial where the principal of judicial integrity is not, in fact, infringed." Any alleged discussion alluded to by defendant would have been purely casual in nature; both the trial judge and counsel for plaintiff are experienced enough to know better than to discuss issues in a current trial over lunch. Further, there is absolutely no indication that any juror observed or was aware of the alleged conversation. A finding of prejudice cannot be made in the absence of any facts to support such an allegation, and a new trial is not required.

* * * *

In The Supreme Court of Missouri

Case No. _____

NATHAN L. COULTER,
Plaintiff-Respondent,

v.

MICHELIN TIRE CORPORATION,
Defendant-Appellant.

APPLICATION FOR TRANSFER BY THE SUPREME COURT AFTER OPINION BY MISSOURI COURT OF APPEALS, SOUTHERN DISTRICT, DIVISION TWO

Comes now Michelin Tire Corporation, Defendant-Appellant, and pursuant to Supreme Court Rule 83.03, moves the Court for an order transferring the above cause to the Supreme Court for hearing.

In support of this application, Defendant-Appellant states to the Court:

1. The question of general interest and importance involved in this case can be stated as follows:

> Whether or not in a products liability case against the manufacturer of an allegedly defective tire, a submissible case is made when the only evidence of the alleged defect comes in the form of an opinion from an expert who lacked the experimental capacity to form and express an opinion of probative value because he (1) had never before examined a Michelin tire (Appellant's Brief p. 48), (2) was not familiar with the Michelin manufacturing process (Appellant's Brief p. 48) and (3) had never before seen two breaks in any tire such as occurred in this instance (Appellant's Brief p. 44); and yet was permitted to testify the fact there were two breaks indicated the presence of a defect in this Michelin tire.

The Court's opinion is obviously contrary to the requirements for this type of expert testimony as established by the Supreme Court in two cases, *Craddock* v. *Greenburg Mercantile*, 297 S.W.2d 541

(Mo. 1957) and *Gaddy* v. *Skelly Oil Co.*, 364 Mo. 143, 259 S.W.2d 844 (1953). (Appellant's brief p.p. 39-49) To permit plaintiff's expert to testify based upon speculation or conjecture without facts or adequate data would be to change the law in Missouri.

2. The second question of general interest to the bar and importance to the public is the propriety of the trial judge's eating lunch with counsel for plaintiff in the courthouse's public snack bar while the members of the jury had been released for lunch and were free to observe this lunchtime meeting. The unfairness and impropriety of such a public luncheon during trial were first argued to the trial judge as part of the defendant's after trial motion for a directed verdict at the close of all the evidence or, alternatively, for a new trial. In Plaintiff's Suggestions in Opposition to this motion, made by the defendant, plaintiff's counsel conceded the basic facts of the meeting between plaintiff's counsel and the trial judge, but sought to minimize its significance by characterizing the encounter as brief and stating that the instant action was in no manner discussed.

Since plaintiff's counsel admitted the meeting, and since the trial judge, himself, obviously had first-hand knowledge of the facts, there was no dispute over the basic facts and no affidavit by defendant's counsel was required for a ruling. The trial judge simply overruled the defendant's motion, without comment on the propriety of the meeting.

The Court of Appeals wrote that "[t]here is nothing before us for review on this point," because the point "was raised in motion for new trial, but was not supported by affidavit or otherwise as provided by Rule 78.05." (Opinion p. 24) As just demonstrated, the facts of the encounter were established by the admissions of plaintiff's counsel upon the defendant's motion. The facts were thereby fully established for all purposes before the trial and appellate courts.

The basic circumstances of the lunch meeting were further established, if any more support were needed, by a fresh admission of the incident by plaintiff's counsel in the "Statement, Brief and Argument" filed in the Court of Appeals. In Point V, at page 53, plaintiff's counsel concede that the trial judge was "eating lunch and having brief social conversation with counsel for plaintiff in the snack bar of

the courthouse during the third day of the trial," but argue that this conduct was "not improper." Therefore, far from the point not being before the Court of Appeals, the relevant facts were admitted and undisputed.

The lunch meeting raises issues of constitutional dimensions, as well. The defendant was denied its constitutional right to due process of law and to a fair trial pursuant to the Fifth, Seventh and Fourteenth Amendments to the Constitution of the United States if the trial judge was biased against the defendant. The lunch meeting is only one indication of bias on the part of the trial judge. Another manifestation of bias against the defendant was the trial court's denial that the defendant had made a request for a remittitur (Tr. p. 564), when in fact the defendant had made that request (Tr. p.p. 559-560). Therefore, the defendant and the bar are entitled to a ruling as to the propriety and constitutionality of the meeting, as established by the admissions of plaintiff's counsel.

It would seem appropriate to state these questions of general interest and importance as follows:

> Whether or not, during a jury trial, a trial judge is acting with propriety and in conformity with the Canons of Judicial Conduct, in having lunch with counsel to a party in the courthouse's public snack bar while the members of the jury have been released for lunch and are free to observe the meeting. Assuming the lunch meeting did occur, were defendant's rights under the Fifth, Seventh and Fourteenth Amendments to the Constitution of the United States violated so as to require a new trial?

3. The following exhibits are attached and made a part of this application:

(a) The Missouri Court of Appeals, Southern District Division Two, filed its Opinion on August 13, 1981, attached hereto as Exhibit 1.

(b) Defendant-Appellant filed its Motion for Rehearing or Transfer to this Court on August 27, 1981, attached hereto as Exhibit 2.

(c) The Court of Appeals issued its order on September 22, 1981, "Opinion heretofore filed on August 13, 1981, withdrawn.

Cause ordered resubmitted to the full panel which heard arguments on briefs and argument presented on September 11, 1980," attached hereto as Exhibit 3.

(d) The Court of Appeals adopted its Opinion of August 13, 1981, as the Opinion of the Court on October 6, 1981, and entered its ruling on the Motion for Rehearing and Transfer to this Court by denying the Motion to Transfer on the same day, attached hereto as Exhibit 4.

(e) Defendant-Appellant's Brief, attached hereto as Exhibit 5.

(f) Transcript pages 564 and 559-560, attached hereto as Exhibit 6.

(g) Plaintiff's Suggestions in Opposition to Defendant's Motion, pages 10-11, attached hereto as Exhibit 7.

(h) Plaintiff-Respondent's Brief page 53, attached hereto as Exhibit 8.

WHEREFORE, Defendant-Appellant respectfully makes this application to the Supreme Court for an order granting transfer of this cause for a determination by the Supreme Court.

/s/ By JOHN M. KENNEY
John M. Kenney
3000 Marcus Avenue
Lake Success, New York 11042
NEALE, NEWMAN, BRADSHAW & FREEMAN

/s/ By FLAVIUS B. FREEMAN
Flavius B. Freeman #10575
One Corporate Square
P.O. Box 4203 G.S.
Springfield, Missouri 65808
Attorneys for Defendant-Appellant

Opposition

Office - Supreme Court, U.S.
FILED
MAR 4 1982
ALEXANDER L. STEVAS,
CLERK

81-1450

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MICHELIN TIRE CORPORATION,
Petitioner,

vs.

NATHAN L. COULTER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, SOUTHERN DISTRICT

BENJAMIN J. FRANCKA
726 Woodruff Building
Springfield, Missouri 65806
(417) 869-9162

RAYMOND E. WHITEAKER
JOHN E. PRICE
300 South Jefferson, Suite 600
Springfield, Missouri 65806
(417) 869-0581
Counsel for Respondent

March 3, 1982

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTION PRESENTED

Whether a party to a civil action has properly preserved a claimed violation of its due process right to a fair trial where the allegedly improper incident is not raised by a motion for mistrial or otherwise brought to the attention of the court during trial, but is first presented after the rendition of judgment in a motion for new trial.

LIST OF PARTIES

Respondent Nathan L. Coulter has at all times material to this action been an individual citizen and resident of Greene County, Missouri. Petitioner, Michelin Tire Corporation is a New York Corporation.

INDEX

	Page
Question Presented	i
List of Parties	i
Table of Authorities	iii
Statement of the Case	1
Summary of Argument	3
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cardinale v. State of Louisiana, 394 U.S. 437 (1969)	5
City of Olivett v. Grader, 369 S.W.2d 85 (Mo. 1963)	4
Edelman v. State of California, 344 U.S. 357 (1952)	5
Gaut v. Oklahoma City, 289 U.S. 98 (1933)	5
May Furnace Co. v. Conaway, 352 S.W.2d 40 (Mo. 1962)	4
Missouri, K. & T. Ry. Co. v. Sealy, 248 U.S. 361 (1919).	5
Oliver v. City of Higginsville, 527 S.W.2d 690 (Mo. App. 1975)	4
88 C.J.S. Trial, Section 51, Page 138	7

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MICHELIN TIRE CORPORATION,
Petitioner,

vs.

NATHAN L. COULTER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, SOUTHERN DISTRICT

STATEMENT OF THE CASE

This is a products liability case in which the respondent, Nathan Coulter, after a four-day trial in the Circuit Court of Greene County, Missouri, was awarded a judgment for One Hundred Forty Thousand ($140,000.00) Dollars against petitioner, Michelin Tire Corporation (Petitioner's Appendix 25(a)). Petitioner, Michelin Tire Corporation, duly appealed to the Missouri Court of Appeals and after due consideration the Missouri Court of Appeals affirmed the decision (Petitioner's Appendix 1(a)). The Missouri Court of Appeals thereafter granted a motion for re-hearing and after re-consideration again affirmed the decision of the jury (Petitioner's Appendix 24(a)). Petitioner attempts to raise an issue at this time claiming denial

of due process under the Fourteenth Amendment by virtue of an alleged incident in the courthouse snack bar during a noon recess in which the trial judge sat at a table with one of respondent's attorneys. Apparently Petitioner's counsel and representatives were also present (Petitioner's Appendix 32(a)). The alleged incident occurred during the third day of the four day trial. Petitioner did not refer to or raise any issue concerning the incident during the remaining portion of the trial.

The first complaint about the incident raised by the petitioner was in its Motion for a New Trial (Petitioner's Appendix 31(a)). In its Suggestions in Support of Motion for New Trial and in its argument and brief to the Missouri Court of Appeals, petitioner speculates that it may have been prejudiced because a juror may have seen the judge and respondent's counsel together (Petitioner's Appendix 35(a), 41(a)). After the decision of the Missouri Court of Appeals the Petitioner sought a transfer to the Supreme Court of Missouri (Petitioner's Appendix 50(a)). For the first time, in addition to arguing that a juror may have witnessed the trial judge and respondent's counsel together, petitioner suggested that even if this were not true, it nevertheless was denied due process because the incident indicated a bias upon the part of the trial judge. The motion for transfer was denied by the Missouri Supreme Court by its memorandum order.

SUMMARY OF ARGUMENT

The petition for certiorari should be refused for the reason that petitioner did not raise the issues it seeks to have this court rule in a timely fashion. Petitioner made absolutely no reference to the alleged incident during the trial. The matter was raised for the first time in petitioner's after trial motion.

Petitioner's application should be denied for the reason that petitioner had a fair trial; all the issues were thoroughly, fairly and ably litigated. The entire record of the lengthy trial has been thoroughly reviewed by the Missouri Court of Appeals and found to be without error. Petitioner has never alleged that any actual prejudice resulted from the incident; its entire argument is based upon speculation. None of petitioner's constitutional rights have been violated.

ARGUMENT

Petitioner contends that it was denied a fair trial, in violation of the Due Process Clause of the Fourteenth Amendment, by the allegedly improper conduct of the trial judge. The claim of impropriety is based solely on the allegation that the trial judge and one of counsel for respondent were observed sitting at the same table in the small courthouse snack bar during the noon recess of the third day of trial in this cause.

The petitioner for certiorari should be denied due to petitioner's failure to raise and preserve the issue in a timely manner. No reference was made to the incident during the trial; it was only in petitioner's after trial motion that the issue was presented to the trial court. Given the very small physical dimensions of the snack bar and the presence of petitioner's counsel and representatives, respondent suggests that there was nothing inappropriate concerning the alleged incident or the petitioner would have raised the issue immediately. By virtue of its silence the petitioner prevented the trial court from undertaking to determine if any juror had in fact witnessed the alleged incident and if so, what effect it might have had upon the jury. In view of the petitioner's knowledge of the alleged incident when it occurred, it appears that petitioner in effect "sandbagged" the trial judge until the conclusion of the trial and the rendition of an adverse verdict. It then belatedly attempted to raise a claim of denial of due process. Under Missouri law, a constitutional issue must be raised at the earliest opportunity. *City of Olivett* v. *Grader,* 369 S.W.2d 85 (Mo. 1963); *May Furnace Co.* v. *Conaway,* 352 S.W.2d 40 (Mo. 1962). "If a constitutional issue is not properly raised at the trial level, nothing in the nature of a constitutional issue exists to be preserved for appellate review." *Oliver* v. *City of Higginsville,* 527 S.W.2d 690 (Mo. App. 1975). Any constitutional issue which may have existed was waived by petitioner and is not properly before the Court at this juncture.

Furthermore, it was not until the petitioner filed its application for transfer in the Missouri Supreme Court that petitioner, for the first time, alleged that there the mere presence of the judge and respondent's counsel at lunch together constituted a denial of due process (Petitioner's Appendix 50(a)). Respondent again suggests that the issue is raised too late and that there is nothing in the record to indicate bias or prejudice upon the part of the trial judge, or that the petitioner was denied a fair trial or due process of law. *Missouri, Kansas & Texas Railway Co.* v. *Sealy,* 248 U.S. 361, 63 LEd. 363 (1919); *Edelman* v. *People of the State of California,* 344 U.S. 357, 97 LEd. 387 (1952); *Gant* v. *Oklahoma City,* 289 U.S. 98, 77 LEd. 1058 (1933); *Cardinale* v. *State of Louisiana,* 394 U.S. 437, 22 LEd. 2d 398 (1969).

However, even if the Court were to consider the issues framed by petitioner, it is evident that the factual record is insufficient to demonstrate any special or important reason for granting certiorari. Petitioner, when presenting the issue to the trial court and to the Missouri Court of Appeals, alleged a denial of due process without any supporting documentation or evidence. It did not seek or present to the appellate court any support for its claim of denial of due process other than the incidental lunching at the snack bar while petitioner's counsel and representatives were present. Indeed, petitioner has never alleged that any juror witnessed the incident; that the incident in any way affected the jury's deliberations; that any discussion of the pending trial occurred; or that the trial judge was actually biased against it in any way. The Court of Appeals was correct in its reasoning that it needed more than a bare allegation that a luncheon discussion had occurred to enable it to rule on the propriety of the trial judge's conduct.

After the matter was presented to the appellate court, that court granted a motion for re-hearing. On rehearing, the court noted in its order that the petitioner had not accompanied its motion by any request to file new briefs or to raise or argue

points not briefed when the appeal was originally submitted (Petitioner's Appendix 24(a)). Thus, petitioner has failed not once, but twice, to specify any facts which would support its claim of bias or prejudice on the part of the judge or jury.

The reason for this failure suggests itself; the incident was, by petitioner's admission, brief and purely "sociable" in nature (Petitioner's Appendix 42(a)). The only factual background for this encounter was advanced by respondent in his suggestions in opposition to petitioner's after-trial motion:

> It should be specifically noted that the aforementioned encounter between the Honorable Judge Crown and Attorney Whiteaker was very *brief,* that there were *no jurors present,* that the *case was in no manner discussed* and that *defendant voiced no objection* to the conduct which it now complains of, *made no record* regarding this alleged inappropriate conduct, and furthermore *did not request a mistrial.*
>
> The court can take judicial notice of the fact that the public snack bar referred to by defendant is of course quite small and as a result necessitates persons being in close proximity to one another. Under these circumstances it is hard to imagine how such conduct could be construed as conveying the impression that plaintiff's counsel was in a special position to influence the judge.

(Petitioner's Appendix 40(a)). Respondent submits that, absent any allegation of prejudice or resulting bias to petitioner, the conduct of the trial judge was not improper and certainly did not constitute a denial of due process.

It is also noteworthy that none of the authorities cited by petitioner purport to deal with the issue presented herein. Petitioner's authorities all involve improper courtroom conduct, out-of-court business relationship, or interest in the subject matter of the litigation by or between the trial judge and a party.

Respondent has found no case law reaching the instant issue but for the reference in 88 C.J.S. Trials, Section 51, Page 138, that "private communications or conferences between the judge and one of counsel ...while not commendable, ordinarily are not prejudicial where the principle of judicial integrity is not, in fact, infringed." Respondent submits that no such showing has been made, and the petition for certiorari should be denied.

CONCLUSION

Petitioner has alleged only that a brief encounter and discussion occurred between the trial judge and counsel for respondent during the trial of this cause. Never has petitioner alleged a single fact which indicates that any juror witnessed the incident or that any prejudice or actual bias existed on the part of the trial judge. Petitioner received a fair trial in all respects, and the petition for writ of certiorari should be denied.

Respectfully submitted,

BENJAMIN J. FRANCKA
726 Woodruff Building
Springfield, Missouri 65806
(417) 869-9162

RAYMOND E. WHITEAKER
JOHN E. PRICE
300 South Jefferson, Suite 600
Springfield, Missouri 65806
(417) 869-0581
Counsel for Respondent

March 3, 1982